

No. 12393

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United States  
Court of Appeals  
For the Ninth Circuit.

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COLUMBIA LUMBER COMPANY, INC.,  
a Corporation

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-partners  
doing business under the firm name and style of Barry Arm  
Camp,

Appellees,

BRUNO AGOSTINO and STANLEY SOCHA, co-partners  
doing business under the firm name and style of Barry Arm  
Camp,

Appellants,

vs.

COLUMBIA LUMBER COMPANY, INC.,  
a Corporation,

Appellee.

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Transcript of Record  
In Two Volumes  
Volume II  
(Pages 365 to 664)

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Appeals from the United States District Court,  
for the Territory of Alaska  
Fourth Division.

FILED

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THOMAS A. MORGAN

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. Thomas A. Morgan.

Q. And what is your occupation?

A. Manager—General Manager and President of the Columbia Lumber Company.

Q. And what is the Columbia Lumber Company, Mr. Morgan? . A. It is an Alaskan corporation.

Q. And how long has it been in existence in Alaska?

A. We were organized as an Alaskan corporation, I believe, in 1947 in the spring.

Q. Do you operate entirely in Alaska?

A. That is right.

Q. Now, Mr. Morgan, what is the business that the Columbia Lumber Company is engaged in?

A. It is rather varied, we manufacture building materials of all kinds as well as lumber. We produce lumber at two different sawmills and distribute the same. We operate tow-boats and other attentive equipment. [302]

Q. How do you usually operate in regard to getting timber to cut?

A. Our policy for many years has been to contract with independent loggers—men to whom we

(Testimony of Thomas A. Morgan.)

will give a contract to produce a specified quantity of timber each year, anywhere from perhaps a million feet to perhaps 10,000,000 feet.

Q. Do you have any control over the manner in which those men operate with regard to how they handle their employees and the detail of their business?

A. We do not. We give each one a contract which is properly set up to give them full jurisdiction and they are in fact an independent contractor—hire the men, fire them, and provide the usual supervision as an independent contractor.

Q. Now, Mr. Morgan, are you familiar with the area around Barry Arm?      A. I am.

Q. And has Columbia Lumber secured any timber contracts in regard to that area?

A. We have and still hold two separate contracts to cut timber and one is known as the East Mosquito Flats and the other the West Mosquito Flats.

Q. When did you secure those contracts?

A. The contracts were actually signed in the early part of 1948 but in the fall of 1947 we cruised the area and started negotiations to purchase. We requested the Forest Service [303] to advertise them and subsequently that was done. We advertise in the newspaper.

Q. Did anyone have an opportunity to bid for those areas?

Mr. Bell: I object to that as incompetent, ir-

(Testimony of Thomas A. Morgan.)

relevant and immaterial and not within the pleadings and not an issue here.

The Court: Upon the ground that it is irrelevant the objection is sustained.

Mr. Boochever: Your Honor, I believe it is relevant in view of counsel's opening statement to the jury.

The Court: I do not remember it but I will take counsel's word for it that there was something in the opening statement.

Mr. Bell: I would like to have counsel state for the record what part of the opening statement would make it valid.

Mr. Boochever: I think it should be done outside the presence of the jury. I will be glad to approach the bench.

The Court: It is not sufficiently important; counsel may ask the question and the objection will be overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. As is the ordinary custom they are advertised and when they are advertised they ask for bids from all comers and all and everyone has an equal opportunity to bid on the timber and purchase it if he desires.

Q. Who was the timber contracts awarded to?

A. Our bid was the successful bid and subsequently we were [304] awarded the timber.

(Testimony of Thomas A. Morgan.)

Q. When was work started in regard to that timber?

A. Preparations were made in Seattle early in the year. Mr. Lambert was one of the men who made the survey the previous fall and he approached my brother, George, for permission to contract. He wanted to go into the logging business himself and as such cruised the Barry Arm area, liked the timber and an agreement was made with my brother, George, in Seattle in February to log the timber and he was given a contract at that time.

Q. Did he have any authority from you or your brother, George, to bind the Columbia Lumber Company in any agreements of any kind whatsoever?

Mr. Bell: I object to that as merely a conclusion. He could testify to what the facts were but that would be a conclusion as to whether he had authority.

The Court: Objection is well taken and is sustained.

Q. (By Mr. Boochever): Did you ever authorize Mr. Lambert to engage in any contracts or enter into any contracts on behalf of Columbia Lumber Company?

A. No, not as an official of the company or a representative of our company.

Q. Did anyone else to your knowledge who had authority to do so ever so authorize Mr. Lambert?

A. No.

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that. How in the world can he tell, that is a conclusion pure and simple.

The Court: The question embraced the phrase, "to his knowledge." It may not be very enlightening but he can say whether he has any knowledge of what somebody else may have done. The answer is negative but it may be asked and answered.

A. No one else had the authority.

Q. (By Mr. Boochever): What authority did Mr. Lambert have?

A. To go into the area and produce timber under his contract.

Q. Now, calling your attention to March of 1948, did you receive any word from Mr. Lambert in regard to this contract?

A. I understood that Mr. Lambert had departed from Seattle with a few of his men to start in at Barry Arm. I made a trip to Seattle on business and while there received a telephone call at the New Washington Hotel at the time and as I recall the communication during the evening—early evening—so they must have called in the late afternoon at Whittier because there is two hours difference.

Q. About when was that, what date?

A. It was the 20th or 21st of March, somewhere in that neighborhood. It was within a day or two.

Q. And what word did you receive from that telephone call?

A. I talked with both Mr. Lambert and Mr. Rowell and they [306] were both very much excited.

(Testimony of Thomas A. Morgan.)

They told me that they had gone to Barry Arm——

Mr. Bell: We object to the conversation with two of his employees outside the presence of the plaintiffs. It would be purely hearsay. Conversation had outside of their presence would never be admissible.

Mr. Boochever: I believe, Your Honor, that plaintiffs' witnesses testified in regard to this same conversation.

Mr. Bell: He was an employee of the Columbia Lumber Company.

The Court: Objection is sustained.

Q. (By Mr. Boochever): What did you say in regard to that at that time; what did you tell Mr. Rowell and Mr. Lambert?

A. I told them then that action would be taken in due course. The information I had been given caused me a great deal of concern personally. It had been conveyed to me—information had been conveyed that indicated that we were being unlawfully kept out of an area or our contractor was, and, naturally, I resented it as any man would. We held contracts with the Forest Service permitting us to go in there at Barry Arm. It was only natural that when we were confronted by a condition there that smacked of force that we would resent it and I did. I recognized it as a maneuver to force us to take over a lot [307] of equipment we had absolutely no use for and did not want to do it.

Mr. Bell: Now, Your Honor, I move to strike.



(Testimony of Thomas A. Morgan.)

I couldn't object to it, I had no anticipation. It is not responsive to the question.

The Court: Counsel sat and listened to the witness make his statement and the motion is denied for that reason. His statement as to his concern and alarm at being held up, of course, is irrelevant.

Q. (By Mr. Boochever): Mr. Morgan, what did you tell Mr. Lambert and Mr. Rowell?

A. I told them that I would notify them within two or three days as to what I could do personally as to coming up here. I was scheduled for a trip in April. I told them that I would come up as soon as I could to see what could be done.

Q. Then, did you do anything after that in that regard?

A. I returned to Juneau and from Juneau I wired them as to my schedule, told them I was coming to Anchorage about the 7th or 8th of April, would come to Whittier and on out to Barry Arm as soon as transportation could be arranged.

Q. Did you state anything in that wire in connection with Mr. Agostino?

A. I told them, as I recall, to proceed into the area and to go ahead with the establishment of Lambert's camp and that I would be up as stated previously and go into the matter with [308] them.

Q. And did you come up then? A. I did.

Q. First of all, either in your conversation or in your telegram did you by any way authorize the purchase of any of Agostino's property?

(Testimony of Thomas A. Morgan.)

A. None whatever.

Q. Then you say you came up there in April, is that right?

A. Yes, I believe I arrived at Whittier on the 9th day of April.

Q. And where did you go from there?

A. We took one of the tow-boats and made a trip to Barry Arm.

Q. And when you arrived at Barry Arm who was with you?

A. Mr. Rowell, our mill superintendent at Whittier.

Q. And who did you see, if anyone, when you arrived at Barry Arm?

A. We met Mr. Lambert and Mr. Agostino.

Q. And did any conversation take place at that time?      A. Yes.

Q. What conversation took place?

A. They told me—Mr. Agostino and Mr. Lambert—what had happened up to that time.

Q. What did they tell you in that regard?

A. That at first Mr. Agostino had told them he had no business there and could not land and that is the reason they got so [309] excited and called me. And that they had told Mr. Agostino that I would be up and would talk with him and after getting my wire citing the contracts and our privileges I talked to Mr. Burkick, Juneau.

Q. Who is Mr. Burkick?

A. Assistant Regional Director, Supervisor of



(Testimony of Thomas A. Morgan.)

the United States Forest Service. He confirmed again our privileges.

Mr. Bell: I object to telling about the conversation any further.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Was this told to Mr. Agostino. A. Yes.

Mr. Bell: I believe that is proper to tell what he told Mr. Agostino?

The Court: His conversation didn't disclose that he was saying this to Mr. Agostino; this was just some private conversation between Lambert and Rowell and himself.

Q. (By Mr. Boochever): Was Mr. Agostino present at the time?

A. He was one of the four. He took part in all of the discussions.

Q. Then you can tell what you told in the presence of Mr. Agostino?

A. I told him that we had received the full instructions and [310] authority of the Forest Service and having wired Mr. Lambert to proceed into the area that we were doing so on the assumption that we had a full right to do so and cut our timber under our Government contract and therefore asked him what his idea was in stopping us and what he had talked to these other gentlemen about.

Q. And what did he tell you at that time?

A. He told me that he wanted to sell out, to get out of the area, that he was through logging.

(Testimony of Thomas A. Morgan.)

Q. And did you have any discussion about a sale at that time?

A. I told Mr. Agostino that from what I knew of the equipment and the facilities there we had absolutely no use for them. Our LCT had arrived from—had departed from Seattle. It arrived shortly. But at that time told him that we had everything we needed for logging that area and that we were not interested in purchasing that equipment.

Q. At that time did Mr. Agostino have any employees there who were engaged in logging or preparing for logging work? A. He was alone.

Q. Was there any apparent effort that had been made to set up his camp for logging work that you could see? A. No.

Q. Did——

A. As a matter of fact I had understood some time before that he was through, knowing it as I did over a period of two or [311] three years, his partners one at a time had pulled out leaving him alone. He had tried several times to secure others to help with the logging without success.

Mr. Bell: I object to that as irrelevant, incompetent and not responsive to the question at all.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Mr. Morgan, will you continue with your conversation with Mr. Agostino on that occasion?

A. He began—he again told me that he wanted

(Testimony of Thomas A. Morgan.)

to sell and instead of the original \$25,000 that he had talked to these other gentlemen about, he told me that he would sell for \$19,000.

Q. And what did you tell him in regard to that offer?

A. I again hold him that we were not interested in the offer, that the items there were—had only a fraction of that value and that I could see no good reason for us to continue the discussion in an attempt to work out a deal on any such figure.

Q. Did you discuss any other possible basis of working out a deal with Mr. Agostino?

A. That is a little bit hazy in my mind. There was some discussion about a lease.

Q. Did Mr. Agostino agree to any lease?

A. No, there was no conclusion; there was no deal of any kind and he absolutely refused to consider that angle.

Q. Then did you leave the property at that time?

A. I returned to Whittier.

Q. Did you at that time or anytime prior to that authorize any of your employees or Mr. Lambert to use any of Mr. Agostino's property or equipment?

A. As a matter of fact to the contrary I told him I would have nothing whatever to do with it.

Q. Then, subsequently, Mr. Morgan, when did you next see Mr. Agostino?

A. I don't believe I saw Bruno until sometime

(Testimony of Thomas A. Morgan.)

during the latter part of June. Do you want me to relate the conditions?

The Court: I think me may as well suspend at this time. You may step down Mr. Morgan.

Ladies and Gentlemen of the Jury, other matters must be taken up tomorrow morning and I will ask you all to report at 1:30 tomorrow afternoon. Please remember the hour because it is an unusual one and if one of you should be late why it destroys the unity and we cannot proceed until all twelve are here. So please report at 1:30 tomorrow afternoon and we will continue the trial at that hour.

In the meantime I am obliged to remind you of your obligation not to discuss the case among yourselves or with others or listen to any conversation about it and not to form or express an opinion until it is finally submitted to you.

You may retire now and the Court will remain in session.

(Whereupon, at 5 o'clock, p.m., Thursday, June 2nd, 1949, the trial was adjourned until 1:30 p.m., the following day.) [313]

Friday, June 3, 1949

(Whereupon, at 1:30 p.m., the above-entitled matter came on for taking of testimony.) [314]

The Court: Roll of the jury may be called.

(Names of the jurors were called and responded to.)

The Clerk: They are all present, Your Honor.

Mr. Boochever: May it please the Court, we were served with a reply in this matter this morning and we are preparing a motion in regard to that reply. It hasn't been typed yet. I must advise Your Honor of that fact.

The Court: All of these matters may be considered as having been presented and argued and disposed of before the case is finally disposed of. Counsel will preserve that right.

Witness, Mr. Morgan, may resume the witness stand. Counsel may resume the examination.

THOMAS A. MORGAN

called as a witness herein, having previously been duly sworn resumed the stand and testified as follows:

Further Direct Examination

By Mr. Boochever:

Q. Mr. Morgan, I believe when you left off testifying yesterday afternoon, going along chronologically you had reached the month of June, 1948, and you were just telling about receiving word from Mr. Butcher, Attorney for Mr. Agostino. Now, when did you hear from Mr. Butcher?

A. As I recall it was in Juneau about the middle of June.

Q. And what message did you get from him?

A. A——

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that for the reason it is not pleadings—it is not within the pleadings and no proper foundation laid.

The Court: Overruled.

Mr. Bell: Exception.

A. A telephone call came from Anchorage to Mr. Butcher asking me when I would next be in Anchorage, that we had discussed with Mr. Agostino certain phases of this Barry Arm deal and he was very anxious to work out something with me in the nature of a deal.

Mr. Bell: I object to him testifying further because he has answered the question.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Then what did you tell him?

Mr. Bell: Now, I object to that for the same reasons.

The Court: Overruled.

Mr. Bell: Exception.

A. Advised Mr. Butcher that I would be leaving for Anchorage within a few days and would see him upon arrival.

Q. (By Mr. Boochever): When did you arrive in Anchorage, approximately?

A. About the 23rd to the 25th, it might have been the 26th, because I remember our meeting was on the 26th or 27th in Mr. [317] Butcher's office.

Q. And who was present at that meeting?



(Testimony of Thomas A. Morgan.)

A. Mr. Butcher and Mr. Agostino and myself.

Q. What conversation, if any, took place on that occasion?

A. Mr. Butcher presented to me that Bruno wanted to sell the equipment and camp at Barry Arm and on a deal within reason, that is to say, within the range that I was willing to pay for it. I was advised that the price would be—

Mr. Bell: I object to the "being advised" because he is going outside the fields of the conversation now.

Q. (By Mr. Boochever): Who advised you?

A. Mr. Butcher.

Q. At this time and place and in the presence of Mr. Agostino? A. That is correct.

Mr. Boochever: Is the objection still pending?

The Court: Objection was overruled.

Mr. Bell: I withdrew it when he qualified it.

The Court: The objection is withdrawn.

Q. (By Mr. Boochever): Will you continue with your answer, then, Mr. Morgan, please?

A. I discussed the various phases of the deal. I was very reluctant to make a commitment at any price.

Mr. Bell: I object to that as not responsive to the question. [318]

The Court: You must only relate the conversation.

A. And he further told me that probably we

(Testimony of Thomas A. Morgan.)

could get together on something that would be agreeable to both parties.

Q. (By Mr. Boochever): And was an agreement reached at that time?

Mr. Bell: I object to that as calling for a conclusion of the witness.

The Court: Objection sustained.

Q. (By Mr. Boochever): What further was said at that time, Mr. Morgan, to the best of your remembrance?

A. During the discussions of all parties I was informed that the property and the camp would be sold at a figure to be agreed upon.

Q. What was that figure?

A. The final figure was \$10,000. I figured that \$9,000 was our top deal. I went over the various items of equipment again and Mr. Butcher and Mr. Agostino in the discussion finally made the offer of \$10,000 which I subsequently accepted.

Q. By subsequently was that on that same day or the same time or the same conversation or not?

A. Yes, an agreement was reached on that date. I agreed to buy the camp and the equipment and everything there for the figure of \$10,000 and certain other—certain terms were agreed [319] to—certain provisions for occupancy.

Q. When was occupancy to take place?

A. Upon the completion of the deal which provided for furnishing a bill of sale listing the property that was being conveyed.



(Testimony of Thomas A. Morgan.)

Q. And then was there to be any written agreement in regard to that?

A. Yes, it was agreed that Mr. Butcher would prepare it.

Q. Was——

A. He was Agostino's attorney and had discussed all the various phases of the agreement and I agreed to have him prepare it and to forward it to me at Juneau since I had to return that weekend and he said he couldn't have it ready in time, so he subsequently prepared the written agreement that was decided upon at that time.

Q. And did he forward such an agreement to you?

A. Yes, I received it in Juneau right after the 4th of July.

Mr. Boochever: I would like to have this letter marked for identification, please.

The Court: It may be so marked.

Mr. Boochever: Defendant's Exhibit No. G.

Q. I show you a letter which purports to be from Mr. Butcher and ask you if you can identify it?

A. Yes, that is the letter that came with the agreement.

Mr. Ross: No objection.

The Court: It may be admitted in evidence and marked [320] Defendant's Exhibit G and may be read to the jury.

Mr. Boochever: "Harold J. Butcher, Lawyer,

(Testimony of Thomas A. Morgan.)

Anchorage, Alaska, July 2, 1948. Mr. Thomas Morgan, Columbia Lumber Company, Juneau, Alaska. Dear Mr. Morgan: Enclosed you will find two copies of contract which I had Bruno sign which set forth the agreement made in this office last Wednesday. Please examine the terms and conditions to determine whether the contract sets forth our agreement as we understood it, and if it does kindly sign copies of the same before a Notary Public, have it acknowledged properly and send one copy back for Bruno.

“We heard you had driven over the highway to Haines and I have thought of doing that myself sometime this summer as a sort of vacation. Kindly let me know how the road was and what difficulties you had with gas and oil. Very truly yours (signed) Harold J. Butcher. Harold J. Butcher.”

Now, I will show you Plaintiffs' Exhibit No.—Defendant's Exhibit No. D and ask you—no, that is not the right one. I show you Defendant's Exhibit No. B and ask you if you can identify that document?

A. Yes, this came with the letter. This was the agreement drawn up by Mr. Butcher.

Q. At the time that it came did it have this signature—Bruno Agostino—on it?

A. It was signed and notarized.

Q. Now, Mr. Morgan, you say it was signed and notarized at [321] that time, is that right, by Mr. Agostino?

A. That is correct.

(Testimony of Thomas A. Morgan.)

Q. Now, in regard to that agreement was that entirely as you had understood it in the office when you discussed it with and made the agreement with Mr. Butcher and Mr. Agostino?

A. The agreement was basically right with one exception that it did not provide the list of the items that were to be conveyed and which had been agreed upon originally.

Q. Did you make any effort then to see Mr. Butcher in regard to securing such a list?

A. As a matter of fact I came to Anchorage about, I think the 9th of July and called on Mr. Butcher. I wanted personally to discuss it and go over the details again with him and see the list and prepare to comply with the contract which called for the payment on the 11th of July and when I arrived to call on him and found that he had gone to Philadelphia to the Democratic Convention, so I could not contact him.

Q. So did you stay in Anchorage for a period of time that time?

A. I was in Anchorage several days and went to Whittier out, I think, to the woods, back to Anchorage and he had not returned, and since I had to go back to Juneau, discussed the matter with our attorney?

Q. Who was your attorney there that you discussed it with?      A. Mr. McCarrey. [322]

Q. Did you then give any notification to Mr.

(Testimony of Thomas A. Morgan.)

Butcher or to Mr. Agostino in writing about this contract?

A. I did several things, I signed the contract, issued the checks that were called for to comply with our part of the agreement, delivered them to our attorney and notified Mr. Butcher in writing.

Q. I show you Defendant's Exhibit for Identification No. C and ask you if you can identify this exhibit?

A. That is the letter I wrote at that time.

Q. Was that mailed to Mr. Butcher?

A. It was put in the mail on that date.

The Court: Counsel may proceed. I think this exhibit has been already introduced in evidence and read.

Mr. Boochever: No, Your Honor, it was just introduced for identification.

The Court: It hasn't been admitted, then?

Mr. Boochever: No, sir.

The Court: Very well.

Mr. Boochever: At this time I wish to offer this letter in evidence as Defendant's Exhibit H.

Mr. Bell: We object to it for the reason that it is a self-serving declaration, incompetent, irrelevant and immaterial and no proper foundation laid.

The Court: Objection is overruled, it may be admitted and may be read to the jury. It will be introduced as Defendant's [323] Exhibit C, then.

Mr. Boochever: Very well, Your Honor.

"Columbia Lumber Company of Alaska, Anchor-

(Testimony of Thomas A. Morgan.)

age, July 19, 1948. Mr. Harold Butcher, Attorney at Law, Anchorage, Alaska. Dear Mr. Butcher:

“Conformant with your letter of July 2, 1948, I arrived in Anchorage on July 10th and brought the contract back with me to discuss it with you.

“I have been advised that it will be another week before you return and find business conditions such that I am unable to wait any longer.

“The contract you have prepared is acceptable to the Columbia Lumber Company for the most part, except for the fact that no place is itemized the personal property we are getting for the purchase price of \$10,000. That is the reason why I came personally so that I could discuss that portion of the contract with you. I am sure you would not expect me to sign it without a definite understanding as to what the \$10,000 is going to purchase.

“I have signed a check in the sum of \$3,300 and left it with Mr. C. D. Summers, with instructions to pay it to the Clerk of the Court upon your giving him an acceptable list of all the personal property which the Columbia Lumber Company is to get under the contract.

“Sorry I didn't get to see you and trust that you will be [324] able to work this out with Mr. Summers immediately upon your return.

“Yours very truly (signed), Thos. A. Morgan.  
Thomas Morgan, President, Columbia Lumber Company.”

(Testimony of Thomas A. Morgan.)

Now, Mr. Morgan, did you make out any checks at that time?

A. Yes, we made out the \$3300 check specified there, and since the time was up calling for the initial payment of seven hundred and since I had found it necessary to return to southeastern Alaska——

Mr. Bell: I object to the continuing to talk. He has answered the question.

Mr. Boochever: No, Your Honor, he has not answered the question.

Mr. Bell: You asked him if he made out a check.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, he made out more than one check and he is telling what checks he made out.

The Court: He may tell about all the checks he made out but he finished up with some talk of a journey to southeastern Alaska and that hasn't anything to do with checks that I know of.

Mr. Boochever: Yes, it does, because it explains why he made out more than one.

The Court: He can tell about making out the checks. Confine yourself to answering the questions, Mr. Morgan. [325]

A. The third check for the August payment which would be due August 11th under the terms of the contract.

Q. (By Mr. Boochever): And you made out all of these checks in July?



(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that as leading.

Mr. Boochever: Withdraw the question. I am sorry.

Q. When did you make out those checks?

A. They were made up at the time the contract was signed which was about the middle of July. As I recall, on the 10th or 11th while I was here and before I went to Whittier.

Q. What did you do with those checks, Mr. Morgan?

A. The checks and the signed contract I turned over to Mr. McCarrey to handle for me in the event Mr. Butcher arrived in Anchorage while I was gone.

Q. And did you give Mr. McCarrey any instructions with regard to those checks?

Mr. Bell: I object to that as to what he would instruct his attorney.

The Court: Overruled.

A. I requested Mr. McCarrey to act for us to accept the list that would be provided under the agreement and to release the checks to conclude the deal.

Q. (By Mr. Boochever): Now, your letter of July 19th mentioned a Mr. Summers, is there any reason why you did not leave the checks with Mr. Summers? [326]

A. While I was here in July it was determined that we would have to have a representative in Fairbanks and Mr. Summers was acquainted up

(Testimony of Thomas A. Morgan.)

there having been there, so he was the one selected, subsequently went to Fairbanks. The checks that mentioned there as well as the other two were left in the office in the safe in the custody of Mr. Smith for a matter of two or three days over a weekend and I think the following Monday——

Mr. Bell: I object to what he “thinks” from here on out and I object further, it is not responsive to the question.

The Court: Overruled.

Mr. Bell: Exception.

A. So, Mr. Smith, my assistant, personally delivered the checks to Mr. McCarrey.

Mr. Bell: I move to strike that because it is quite clear—he stated he was away from here.

The Court: Do you know whether Mr. Smith delivered these checks to Mr. McCarrey other than what Mr. Smith told you?

The Witness: I do, Your Honor, because they were acknowledged shortly by Mr. McCarrey and he has them in his possession and has ever since.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Now, Mr. Morgan, did you discuss this matter with your [327] attorney, Mr. McCarrey, at that time, too?

Mr. Bell: Now, I object to that for the reason there is no proper foundation laid; there is nothing in the pleadings to indicate that Mr. McCarrey ever discussed it with these people, therefore his state-



(Testimony of Thomas A. Morgan.)

ments to McCarrey would be purely hearsay and McCarrey's to him would be purely hearsay and, of course, McCarrey is not here to testify. He is out of town.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Mr. Morgan, after the contract had been signed and left with Mr. McCarrey what did you do in regard to the property at Barry Arm?

A. I was concerned about the delays, the season was advancing.

Mr. Bell: Now, I move to strike his speech and just ask that he answer the question.

The Court: I didn't understand the answer anyhow.

A. I was concerned about the advancing season and wanted him to——

The Court: Just limit—just eliminate all of these preliminary statements and answer the question.

Q. (By Mr. Boochever): What did you do in regard to the property, Mr. Morgan, just state what you did, not what your reasons for it were?

A. Secured legal advice that I was entitled to receive under the contract and informed our foreman that Barry Arm camp—at [328] our camp—that a contract had been included and to proceed with the repairs of the tractors at that time.

Q. Do you know whether the foreman at Barry Arm proceed to make repairs on the tractor?

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to it unless he knows of it of his own personal knowledge.

The Court: Yes. Overruled. If you know of your own personal knowledge answer, if not do not answer.

A. Yes, subsequently the tractors were taken to our camp and put in the shops and repairs were started.

Q. (By Mr. Boochever): And was it necessary or not to purchase any parts in order to repair those tractors?

A. Yes, they required a lot of parts.

Q. Were those tractors that formerly, I believe, that Mr. Agostino claims he owned? Were they the same model as your tractor that you had there at the camp?

A. No, these machines were R.D. models, approximately ten years older than ours.

Q. Were the parts interchangeable with your tractor?      A. Very few, if any.

Q. And did you have a mechanic work on those two tractors which were taken over from Mr. Agostino's camp?

A. As a matter of fact we had two mechanics working on them.

Q. And approximately how much was spent on the mechanics' [329] wages and on the parts in repairing those tractors?

Mr. Bell: I object to that for the reason it is incompetent, irrelevant and immaterial and no

(Testimony of Thomas A. Morgan.)

proper foundation has been laid for the question.

The Court: Objection is overruled.

Mr. Bell: Exception.

A. Approximately \$2,000 in parts and repairs. Some of the parts are still there having come in after the tractors were returned which have not been returned and I am very doubtful if of any value to us since it being an old model and they were flown up.

Mr. Ross: Object to the witness going on and telling about the parts not being usable.

The Court: Objection is sustained.

Mr. Bell: I move to strike that part of the answer.

The Court: Well, that part of the answer may be stricken.

Q. (By Mr. Boochever): Were the parts which came for these two tractors usable by you in your tractors?

Mr. Bell: I object to that for the reason it is incompetent, irrelevant and immaterial and not tending to prove or disprove any of the issues in this case.

The Court: Overruled. You may answer.

A. Very few, perhaps a few plugs.

Q. (By Mr. Boochever): [330] Now, Mr. Morgan, subsequently did you keep those two tractors?

A. They remained at our camp for a period of perhaps one month.

Q. And then what was done with them?

(Testimony of Thomas A. Morgan.)

A. In the meantime——

Q. Answer the question, please.

A. They were returned to Barry Arm camp to Bruno Agostino.

Q. Why were they returned to the Barry Arm camp?

Mr. Bell: I object to that as calling for a conclusion of the witness.

The Court: Overruled.

A. Because at that time I had received information that the deal would not be concluded, that Mr. Agostino had refused to comply with his portion of the agreement.

Q. And what did you do when you received——

Mr. Bell: Now, I move to strike that for the reason it is incompetent, irrelevant and immaterial and not within the pleadings, no proper foundation laid and not made competent by any previous statement.

The Court: Overruled.

Mr. Bell: Exception.

The Court: Pardon me. The motion is denied, exception will be noted.

Mr. Boochever: Read the question.

(Question read.) [331]

Mr. Bell: Now, Your Honor, I renew my objection for the reason that his answer—my motion to strike his answer was not responsive to the question and it was not competent, if it was, because he received some information.

(Testimony of Thomas A. Morgan.)

The Court: Motion is denied.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Will you now answer the question, please, Mr. Morgan?

A. I believe I did answer that particular one.

Q. What was done when you received the word that Mr. Agostino was not going through with the agreement, if anything was done?

Mr. Bell: I object to the question based upon a supposition that he received some word unless he establishes who he received the word from and whether or not it was from someone who was authorized to represent the plaintiffs.

The Court: The objection is overruled.

Mr. Bell: Exception.

A. The question now, as I understand it, is that what was next done?

Q. (By Mr. Boochever): That is right, Mr. Morgan.

A. Instructions were sent to camp one foreman notifying everyone connected with our operation to return the equipment—all parts supplies or anything that belonged to Bruno—to the place at which it was found originally and as it was and to [332] instruct our boom man, Mr. Hooper, to vacate the premises which he had occupied for the past thirty days approximately.

Q. And did you get in touch with Mr. McCarrey in regard to that?

(Testimony of Thomas A. Morgan.)

A. I did. I had been in touch with him on numerous occasions.

Q. And did you tell him anything in regard to the taking back of the property?

A. I informed him that we had returned everything belonging to Mr. Bruno Agostino.

Q. Mr. Morgan, did you ever have occasion to learn the tractor numbers of the two tractors which Bruno Agostino claimed he owned?

A. Yes, I checked them myself during the early part of 1948, as I recall, the first trip, when Mr. Lambert and Mr. Agostino, Mr. Rowell and I discussed the possibility of the deal.

Q. Have you subsequently written down those numbers anywhere?

A. I believe I have them with me.

Q. Can you read what those numbers were?

A. The R.D. 7, No. 9G4602WST and the R.D. 8, No. 1H2364SP.

Q. Now, Mr. Morgan, do you know Mr. Raymond Grasser—Ray Grasser or Roy Grasser?

A. I do.

Q. When and where did you see him first?

A. At Whittier on the way to Barry Arm camp, probably three years ago. [333]

Q. And calling your attention to September of 1948, did you see him at any time during that month?

A. Mr. Grasser arrived in Whittier and approached me regarding—



(Testimony of Thomas A. Morgan.)

Mr. Bell: Now, I object to the rest of the statement.

Mr. Boochever: Just answer my question, please, Mr. Morgan, did you see him at that time?

A. Yes, he came to Whittier in early September.

Q. And at that time did you have any conversation with Mr. Grasser?

A. He asked me if we would——

Mr. Bell: I object to him stating any of the conversation. He can answer the question.

Q. (By Mr. Boochever): Did you have a conversation with him? A. I did.

Q. What was the subject of that conversation? Not what was said by Mr. Grasser but what was the subject of the conversation.

Mr. Bell: I object to that for the reason it would be hearsay and not in the presence of the plaintiffs here and not binding on the plaintiffs and nothing could be said that would be binding on them.

The Court: Overruled.

Mr. Bell: Exception. [334]

A. I was requested to lease our——

The Court: No.

Q. (By Mr. Boochever): I want to know what the subject of the conversation was?

The Court: Your counsel is smart enough to ask you the questions, you just answer them.

A. Regarding the procurement of our barges and tugs for a trip to Barry Arm to remove equipment.

(Testimony of Thomas A. Morgan.)

Q. (By Mr. Boochever): And what did you tell Mr. Grasser?

Mr. Bell: I object to that for the reason on the same grounds—it would not be binding on these plaintiffs here.

The Court: Overruled.

Mr. Bell: Exception.

A. I told him under no circumstances would we consider such a deal; that we had no authority and could not participate in any way.

Q. (By Mr. Boochever): Did you tell him anything in regard to whether you claimed those tractors or not?

Mr. Bell: I object to that for the same reason.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Then, Mr. Morgan, did you do anything about giving him a barge or letting him lease a barge or anything of that nature? [335]

A. We did not.

Q. Did you see Mr. Grasser subsequently?

A. I saw him again about the end of September.

Q. Where was that? A. At Whittier.

Q. Where were you then?

A. I was at Whittier at the plant.

Q. And what was Mr. Grasser doing at that time?

A. He came down to go aboard the LCT MahinaOho.



(Testimony of Thomas A. Morgan.)

Q. Do you have any interest in that vessel or the company that owns it or the management of it or anything of that nature?

A. None whatsoever.

Q. And what did he do with that vessel, if you know?

A. I saw the boat departing in the direction of Barry Arm last.

Q. And after that do you know whether the tractor and donkey which Mr. Agostino claims were there at Barry Arm after that time?

A. My next trip, which was shortly thereafter, the machines—the two tractors as well as the donkey—were gone.

Q. Do you know whether or not Columbia Lumber Company ever authorized the removal of those—the donkey and the tractors—from the property of Mr. Agostino there at Barry Arm?

A. We did not.

Q. To your knowledge did any Columbia Lumber Company employee ever have anything to do with removing them after they were [336] returned in early September from Mr. Agostino's property?

A. To my knowledge, no.

Q. Do you know whether the other tractor which was there remained there, which you say your men returned to Barry Arm, remained there?

A. Pardon me, you mean whether there was one of Bruno's tractors remaining there?

Q. That is right.

(Testimony of Thomas A. Morgan.)

A. Both of the tractors and donkey I mentioned a moment ago were gone.

Q. Subsequently gone?           A. Yes.

Q. Now, Mr. Morgan, I want to go into one other matter with you in regard to the timber there. I believe you testified that Columbia Lumber Company purchased a timber contract. Now, have you examined at all where the timber was cut by Columbia Lumber?

A. Yes, I have covered the area fairly well and I believe I could testify as to where it was cut.

Q. Do you know where Bruno Agostino's contract—where his timber was located?

A. On the southern part of the area directly behind his camp along the hillside adjoining.

Q. And to your knowledge did Columbia Lumber Company, any of its employees or Mr. Lambert, its independent contractor, ever [337] cut any of Mr. Agostino's timber?

A. I know the Columbia Lumber never cut a single tree and I am confident that Mr. Lambert did not.

Mr. Boochever: Your Honor, I am wondering if we might have a five-minute recess at this time before concluding the examination of this witness?

The Court: Court will stand in recess until 2:15.  
(Short recess.)

The Court: Record will show all the jurors present and counsel may proceed with the examination.

Q. (By Mr. Boochever): Mr. Morgan, referring

(Testimony of Thomas A. Morgan.)

to the two caterpillar tractors claimed to be owned by Mr. Agostino, what was their condition when they were taken over by the Columbia Lumber Company toward the end of July, 1948?

Mr. Bell: I object to that unless he is first qualified to show what their condition was.

Q. (By Mr. Boochever): I will change that question. Do you know what their condition was?

A. I do.

Q. What was their condition?

A. Individually or generally?

Q. Well, each one, yes.

A. The R.D. 7 had no towing winch and no blade dozer. The [338] machine was basically sound, tracks were quite worn and would have required a lot of work before it could have been used for our purpose.

The R.D. 8 was in much poorer condition, having shown the effect of salt water. It had no blade and no towing winch but was equipped with sort of a carry-all attachment, two small drums at the rear of the machine, which, of course, would not be usable in our work. The motor of the R.D. 8 appears to require work and could not be operated as it was until it had been gone through thoroughly to be sure the rust and all the sediment could be taken out.

The donkey, so-called, hoist in reality because the gears—the drums were geared alike and was not a logging unit, the main shaft was sprung and I

(Testimony of Thomas A. Morgan.)

could not determine the condition of the motor because we did not go into that that carefully.

Q. Did your men ever take possession of the donkey or use the donkey in any manner?

A. It was never touched.

Q. With regard to the tractors there, what type of tractor was most suitable for logging under the conditions that existed there at Barry Arm for your timber contract and the portion of it upon which you proceeded to log in 1948, upon which Mr. Lambert—

A. We chose the D-7.

Q. What was the reason for that?

A. It is more suitable. The timber was smaller. The D-7 [339] it was lighter; it didn't bog down like a heavy D-8.

Q. Now, were two tractors needed for your operation there or were you able to get along with one tractor?

A. We got along very well with one.

Q. Now, Mr. Morgan, one other question, after the contract which you refer to as having been made at the end of June and which was reduced to writing was entered into there, were you at all times ready and willing to go through with that contract?

Mr. Bell: I object to that purely as a conclusion.

The Court: Overruled.

A. I was always ready and still am glad to complete the deal right now if we could on the terms of our original agreement.

(Testimony of Thomas A. Morgan.)

Mr. Boochever: That is all, Your Honor.

The Court: Counsel for plaintiffs may examine.

Cross-Examination

By Mr. Bell:

Q. Did you ever see Bruno Agostino after the day you saw him in Mr. Butcher's office until this trial started?

A. I am just trying to think. I have seen him so many times at different places at different times. I am just not sure about that, Mr. Bell.

Q. Had you met with him two or three times before that or after the conference between you and he at Barry Arm camp on April 10th and the time you met him in Butcher's office, had you met him several times? [340]

A. I can't testify during that particular period but I do remember trying to find him in August.

Q. Well, that was after this suit was filed, wasn't it?      A. That is correct.

Q. You never tried to find Bruno at any time until after August, did you?

A. No, as a matter of fact I did not. After August, you say, after April?

Q. I say from July—June, it was in June that you met Bruno in Mr. Butcher's office, wasn't it?

A. That is right.

Q. Now, you never tried to find Bruno at any time after that until late in August, you say?

A. I believe that is correct.

Q. Do you know Mr. Socha?      A. Yes.

(Testimony of Thomas A. Morgan.)

Q. Do you know where he lives here in town?

A. No.

Q. You know that he does live there, don't you?

A. I have heard that he does.

Q. You never did talk to him either, did you, Mr. Morgan?

A. No, but we discussed it when we were trying to find Bruno.

Q. No, not what you discussed with someone else, tell me what you did in trying to find Bruno, not by discussing among yourselves something.

A. I tried to locate Bruno through Mr. Butcher, his attorney.

Q. And that was after you knew that Mr. Ross had been employed and Mr. Butcher was no longer his attorney, isn't that right?

A. No, you are not correct.

Q. Why do you state that after talking to Mr. Butcher, "I told him to go ahead and prepare the contract for me." Now, what did you mean by that? "Go ahead and prepare the contract for me."

A. Ordinarily our attorneys prepare all our contracts. I was perfectly agreeable to have him draw the contract as agreed upon by the three of us, meaning by "us" probably other than me because we were all involved.

Q. Just when did you sign that contract? What date did you sign it?



(Testimony of Thomas A. Morgan.)

A. The exact date would be hard to state because it was sometime in July.

Q. Who saw you sign it?

A. Mr. McCarrey.

Q. When did you sign it? Where did you sign it?

A. In his office.

Q. Here in Anchorage?

A. That is correct.

Q. And you are positive that that was sometime in July?

A. As nearly as I understand I made so many trips and calls at his office so many times that the exact date would be hard to certify to but as I recall it was during that period. [342]

Q. Would you state positively that that wasn't after this lawsuit was filed?

A. I knew of no lawsuit when I signed the contract. As a matter of fact, Mr. Butcher was still representing Mr. Agostino.

The Court: Pardon me. I think it is only fair to say to the witness that the lawsuit was filed, according to the Clerk's stamp, on August 1st, 1948.

Mr. Bell: I am glad you put that in the record for us, Judge, because I didn't know the date.

Q. When did you first hear from Mr. Ross about this matter?

A. I am not able to say that; as I recall, the letter came in it was in the fall sometime. I turned it over to Mr. McCarrey.

Q. It was in August, wasn't it?

(Testimony of Thomas A. Morgan.)

A. It doesn't occur to me it was that early, although it could have been late August or early September, because as a result of the letter, knowing that Mr. Bruno had failed to carry out our agreement——

Mr. Bell: Just answer the questions and let's not have any speeches.

The Witness: All right.

Q. (By Mr. Bell): Now, then, you never wrote Mr. Ross or told Mr. Ross at any time that you had ever signed this contract until after this suit was filed, did you? [343]

A. Not personally. My attorney was handling that.

Q. Why didn't you send a copy—signed copy—to Bruno Agostino?

A. Mr. McCarrey handled that and apparently insisted that the original agreements——

Q. I am asking you why didn't you do it? You introduced a letter that Mr. Butcher wrote you asking you to sign them and send a signed copy for Bruno Agostino, now why didn't you do that?

A. Because the contract had not been complied with.

Q. Well, why did you sign it later, then?

A. I was advised that in order to complete our part of the deal we would have to sign and put up the checks and proceed accordingly. Having done so we complied.

Q. Now, just to refresh your memory, Mr. Mor-

(Testimony of Thomas A. Morgan.)

gan, I may be wrong, wasn't that after the suit was filed and your attorney advised you you had better sign this contract?

A. Oh, no, that was a month or two before at least, probably two.

Q. Why didn't you tell Bruno or why didn't you write Bruno, why didn't you tell somebody that you had signed it?

A. I just told you—I tried to find Mr. Bruno and I had other people try to locate him, too.

Q. And you didn't write him a letter?

A. Mr. McCarrey may have. He was in touch with Bruno. [344]

Q. Why didn't you do it?

A. Because Mr. McCarrey was our attorney handling the entire matter for us.

Q. You didn't employ Mr. McCarrey in this matter until this suit was filed?

A. Mr. McCarrey represented us during the entire period early in the year.

Q. In this matter? A. And others, too.

Q. Why didn't you tell Mr. Butcher that Mr. McCarrey was representing you?

A. I tried to find Mr. Butcher even when he got back from Philadelphia. His office was torn up. I tried to locate him.

Q. Did you ever see Stanley Socha anywhere and talk to him about October 31st?

A. I did not.

Q. Of this year?

(Testimony of Thomas A. Morgan.)

A. I haven't seen him, in fact, until in this court room for probably about two years. He left Barry Arm and Whittier area sometime ago.

Q. And you haven't seen him for two years until you saw him in the court house?

A. That is my recollection.

Q. Now, did you see Mr. Agostino in October—on July the 10th, 1948? [345]

A. No, I did not.

Q. Didn't you hear your witness yesterday testify that you were there at the Columbia Lumber Company camp and that he and Agostino signed that timber extension?

Mr. Boochever: Objection, Your Honor, that is an incorrect statement of what was testified yesterday. The witness definitely stated that Mr. Morgan was not there.

The Court: Well, the counsel is asking the witness whether such testimony was given or whether he heard such testimony, which I think is proper, and the witness can say whether he remembers any such testimony.

Mr. Boochever: But, Your Honor, I don't think that there is any relevance to asking him whether he heard testimony here in court as to what was said in court here here; it doesn't seem relevant at all.

The Court: It may serve to refresh his recollection, at least. Overruled.

Q. (By Mr. Bell): Did you hear this Mr. Jacob-

(Testimony of Thomas A. Morgan.)

sen testify yesterday about the signing of that timber extension?      A. I did.

Q. And did you hear it said in there that it was done on a lumber pile near your office in Whittier?

A. I did.

Q. And didn't you hear him say that you were there at the [346] time?

A. At the plant in Whittier at the time, as I recall I possibly was.

Q. You were at that plant on July 10th, 1948, weren't you?

A. I would have to investigate the records to be sure.

Q. Well, can't you remember where you were along about that time?

A. Unfortunately, no, Mr. Bell. I travel around a lot. I am on the go practically constantly. I did keep 'plane records.

Q. Do you have records with you now to see where you were on July 10th, 1948?

A. I am afraid I do not have detailed records, but you may be basically right. I know I was up here during that period and if I wasn't at the plant that day I was within a very few days because as I recall I came up here to see Mr. Butcher and about the 8th or 9th——

Q. Did you talk to Mr. Jacobsen about getting this extension signed by Bruno?

A. No, I had nothing whatever to do with that.

Q. Did you ever talk to Mr. Jacobsen about it

(Testimony of Thomas A. Morgan.)

at all?

A. He told me later the extension had been granted.

Q. Just a voluntary statement that the extension had been granted, that is what he said?

A. That is right.

Q. I will ask you if you didn't know what you had down there [347] on the grounds when you were down there talking to Bruno and to Ted Rowell and Mr. Lambert right there at Barry Arm camp on April 10th, I will ask you if you didn't know what was there?

Mr. Boochever: Excuse me, Your Honor, I object to that question as too general.

The Court: Overruled.

A. The basic items, yes.

Q. You knew what cats were there, didn't you?

A. That is right.

Q. You knew that you had an R.D. 8 and an R.D. 7 there near where you were talking, didn't you?      A. I did.

Q. You knew that the bunkhouse was in sight of you, didn't you?      A. That is right.

Q. You knew where the donkey engine sat?

A. Correct.

Q. And you saw the sawmill sitting there, didn't you?      A. Yes.

Q. Now, you did know where the pond was, didn't you?      A. That is right.



(Testimony of Thomas A. Morgan.)

Q. And the number of piling, approximately how it was built, don't you?

A. That question I will take exception to, Mr. Bell, because to my knowledge there was no piling except a few little set [348] post in front of the so-called sawmill.

Q. And that is all you saw were just some little set post at the sawmill?

A. Near the sawmill.

Q. So all these other men who testified about the piling were wrong?

A. I believe Mr. Jacobsen confirmed my remarks and one or two others that there were a few pilings in front of the mill.

Q. And that was the only ones that were ever there?

A. In fact one of your pictures will show them.

Q. That is all you ever did see there in front of the sawmill?

A. We drive pilings all the time; it is necessary. The storms cash them out.

Q. You knew where the roads were, didn't you?

A. That is right.

Q. You knew the roads were necessary for your timber operations to get your logs to deep water?

A. That is not correct. We have not used his roads to haul a single log on.

Q. How do you get them down to tidewater?

A. They are floated down the river. They are hauled from our spar trees by tractors above our

(Testimony of Thomas A. Morgan.)

own camp which is three-quarters of a mile north of Bruno's, so we don't have occasion to use any of their roads.

Q. How did you do it when you were cutting Bruno's timber? [349]

A. That question has been answered. We never cut Bruno's timber.

Q. It is still standing?

A. To my knowledge.

Q. When were you there last?

A. October of last year.

Q. Do you know where Bruno's timber was that he had paid for in October—October 31st, 1947, do you know where that 250,000 feet board measure was standing?

A. I know his logging area. I don't have any knowledge that there was such a patch of timber except possibly a small corner way back up on the hillside.

Q. That would be over on some other creek other than where he was operating, would it?

A. No, the same area.

Q. Way up on a hillside, was it?

A. Back from the water quite a distance, yes.

Q. Now, did you ever tell Bruno or the plaintiffs or Mr. Butcher that you had signed this contract?

A. Not personally because I didn't see Mr. Butcher.

Q. Now, did you ever tell Mr. Butcher or Mr. Ross, Mr. Agostino or Mr. Socha that you had ever

(Testimony of Thomas A. Morgan.)

written these checks?      A. Mr. McCarrey—

Q. Answer the question, don't dodge it.

A. No, I did not. I haven't see them. Mr. Ross came into [350] the picture after we returned everything and the deal was off.

Q. You never told anybody except your own attorney and somebody in your employe that you wrote these checks?      A. That is correct.

Q. And you never told the Court Clerk here that you wrote the check for him for \$3300, did you?

A. That is right.

Q. And you never did deliver it to him and it has never been delivered to this date, has it?

A. That is correct.

Q. You didn't make a deposit at the Bank of Alaska to Bruno Agostino's account as provided in the contract, did you?

A. The contract did not provide it until it was completed; it was not a deal until it was completed. He did not comply with his part of it.

Q. I thought you said you completed?

A. I completed my portion of it and there was a clause which entitled me to go ahead under that.

Q. Did you ever deposit any money in the Bank of Alaska to Bruno's account?

A. Not at the Bank of Alaska.

Q. Did you deposit any money anywhere to Bruno Agostino's account as provided in that contract?      A. No, the checks were only written.

Q. And left in one of your employe's hand?

(Testimony of Thomas A. Morgan.)

A. And delivered to Mr. McCarrey to complete and handle for us.

Q. And you don't know why that somebody wasn't informed of that fact, do you?

A. I am satisfied that Mr. Butcher was informed of the fact, Bruno's attorney.

Q. Have you talked to Mr. Butcher since you have been in town?      A. Yes, sure.

Q. And you are going to have him here as your witness, aren't you?      A. That is correct.

Q. How many times were you at Barry Arm camp during the year of 1948 or during the summer, we will say?      A. Oh, four or five, probably.

Q. And did you ever see Bruno Agostino there after the 10th day of April, 1948?

A. I don't recall having seen him. I understood he passed through Whittier at the time Mr. Jacobsen was there but I don't recall having seen him at any time during that period.

Q. I will ask you if you didn't have Mr. Agostino to meet you here in town in June of 1948?

A. That is right.

Q. And didn't you have him meet you up to your lumberyard here?

A. I don't recall that. I remember meeting him at Mr. Butcher's [352] office.

Q. Didn't you first meet him up at your lumberyard at your office here?

A. The night before—the night, I believe he did

(Testimony of Thomas A. Morgan.)

come down that way and I saw him briefly and we met the next day.

Q. Didn't you tell him to wait a little bit that you would be back and you didn't go back?

A. I don't recall that.

Q. Did you have some emergency come up or something that day that you know of?

A. No, not to my knowledge.

Q. Did you have an emergency come up the 12th day of April of 1948 on the 11th?

A. No, not to my knowledge.

Q. Why didn't you go back and see Bruno in two days at his camp like you promised him you would on the 10th of April?

A. That is absolutely wrong, Mr. Bell. I made my trip as I promised to make and after I concluded my business there I immediately carried out the rest of my schedule.

Q. Did you know that Bruno sat there and waited for you approximately three weeks do you know that?

A. Not at all. I have no knowledge of that and no reason for him to wait because there was no plan to come back.

Q. You did tell Blacky Lambert to start up the machinery, didn't you? [353]

A. Now that is a question that puzzles me. I know that something was said about trying them out and I don't recall actually authorizing him to. He wanted—he said, I think, we ought to check the

(Testimony of Thomas A. Morgan.)

machines, look them over and possibly see if they will start.

Q. And then you told him to start them up?

A. Not as an order.

Q. Did you tell Bruno there that you would be back and see him in a couple of days?

A. I did not.

Q. Well——

A. I had no schedule—I had a schedule to maintain.

Q. You had no intentions of seeing him in two days?      A. No, not in two days.

Q. Did you intend to pay him anything for the privilege of taking over his camp and his tractors and everything?

A. Why should we, Mr. Bell, we didn't take it over. We had nothing to do with it.

Q. You were informed that you couldn't land there, that it was a one-man operation and that you couldn't land there unless you bought him out, by Mr. Lambert and Mr. Rowell, weren't you?

A. That is right.

Q. Now, then, they did tell you the price he wanted, didn't they?

A. I don't recall that, not over the 'phone. Are you referring [354] to the 'phone conversation?

Q. Yes.      A. Oh, no.

Q. Did they tell you anywhere prior to the 10th day of April what Mr. Agostino said?

A. I think I did hear before I went up there, yes.



(Testimony of Thomas A. Morgan.)

Q. Did Mr. Lambert tell you that?

A. Yes, I believe, in our discussions he mentioned—

Q. And he told you he wanted \$19,000 for the machinery—for the machines and equipment—and \$6,000 for the buildings and timber rights?

A. I think that was what he told me before we started discussing it at Barry Arm.

Q. Now, then, you did tell Ted Rowell and Blacky Lambert to go in there and take over, didn't you?

A. I wired Mr. Lambert to proceed under the terms of our contract with the Forest Service.

Mr. Bell: Read the question.

(Question read.)

A. No.

Q. You didn't do that?

A. I did not tell Mr. Rowell and Mr. Lambert to go in and take over. If I may tell you what happened?

Q. No, I am asking you if you did that? You heard Mr. Lambert testify that you did direct him to— [355]

Mr. Boochever: Excuse me, I believe the witness is entitled if he is asked whether he didn't say something to tell what he did.

The Court: You may tell precisely what you did say.

Mr. Bell: I object to him volunteering any statement and object for the record.

(Testimony of Thomas A. Morgan.)

The Court: Overruled.

A. I told Mr. Lambert to proceed to Barry Arm, land and go ahead with logging operations under the terms of our contract.

Q. (By Mr. Bell): And that was after they had told you that Agostino had blocked them?

A. That is right.

Q. And did you tell them to have the United States Marshal at Anchorage to put Agostino off there?

A. That is absolutely wrong.

Q. Did you say anything to them about having the Marshal help you in any way?

A. I may have mentioned to go about our business in a legal fashion and if he threatened our men and blocked us from going in there to get protection to see that our men were not molested.

Q. You have accomplished your purpose in taking over the Barry Arm operations, haven't you?

A. Not in any sense of the word.

Mr. Boochever: Object to that question as immaterial. [356]

The Court: It has been answered.

Q. (By Mr. Bell): You have cut something over 3,000,000 feet of lumber there, haven't you or logs?

A. Yes, that is probably right.

Q. And how much more do you anticipate cutting there?

A. We hope to get 7 or 8,000,000 more.

Q. And the only method by which you could handle that timber was the landing in Mosquito Creek, wasn't it?

(Testimony of Thomas A. Morgan.)

A. Yes, that is the easiest way although we have used a cove farther down, farther away from Bruno's camp. We have found that very feasible, too.

Q. How far is that from there?

A. Another mile or so. We didn't know at that time. Probably half a mile.

Q. You didn't know about it at that time? You did then want to get in possession at Barry Arm for the purpose of cutting about 10,000,000 feet of logs, is that right?

A. By "possession" what do you mean?

Q. Well, you wanted to get in there and get established, didn't you?

A. We wanted to proceed with our contract, yes.

Q. Now, then, didn't you have that in mind the year before when you sent two men in there timber cruising right up through by Bruno's place, didn't you? [357]

A. An explanation of that, Mr. Rowell and Mr. Lambert went on the timber cruise. Actually they just went around the Point. We were logging at Patton around the Point and we knew about the timber at Barry Arm.

Q. You saw that report, in fact, you did take that report that Rowell and Lambert made?

A. I did, but I didn't need it because I knew personally.

Q. What did you dictate it for?

(Testimony of Thomas A. Morgan.)

A. I did not. I did not see that report until probably sometime in the winter.

Q. Did you have a brother who was formerly associated with you there?

A. He was formerly a mill superintendent at Whittier prior to Mr. Rowell.

Q. His name was George? A. George.

Q. He did dictate that, didn't he?

A. I have no knowledge who dictated that.

Q. Did you send Ted Rowell and Blacky Lambert—were both on your payroll in the fall when they made that timber cruise, weren't they?

A. I believe that is right.

Q. And you sent them up there and after they came back you knew there was an abundance of timber on Mosquito Creek?

A. I did not send them up there. I already knew the timber [358] was there.

Q. Do you know why they were——

A. It is our custom. We cruise timber after the mill closes and before the heavy snows prevent us.

Q. So that you can get it for the next year's operation?

A. We try to plan three years ahead if we can. We do not always succeed.

Q. I believe that report shows this is the best available timber on, I believe it said, Prince William Sound?

A. The northwest corner. Doesn't it specify

(Testimony of Thomas A. Morgan.)

that, because the best timber is over in the Cordova area.

Q. I will ask you if you don't remember this part of this agreement "Close examination proves that these logs could be floated down the slew with a little preliminary work" do you remember that?

A. I received the report. Yes, I recollect that.

Q. You received the report? A. Yes.

Q. Did this mean anything to you "The ground aside from a little soft muskey is gravelly and easily travelled for either cat or truck" did that mean anything to you?

A. Not particularly. I already knew about it, Mr. Bell.

Q. You knew that that particular fact made it inviting to you?

A. I had seen it before and made a cruise of it and checked from an engineering standpoint and already ascertained it could [359] be logged successfully.

Q. Then all you needed after you got Mr. Jacobsen to get the permit for you to cut the timber or timber sale, all you needed then was Bruno Agostino and Socha's site, wasn't it?

A. Except that Mr. Jacobsen had nothing to do with the contract.

Q. Well, I thought he did it. He run the ads and told the jury how he did it and everything and I suppose he was probably telling the truth.

(Testimony of Thomas A. Morgan.)

A. The Regional Office handled it and it went through his hands but it was too big.

Q. So he didn't run the publication?

A. They were put in the Cordova papers as well as others.

Q. The Regional Office is at Juneau, isn't it?

A. Yes.

Q. It was handled at Cordova, wasn't it?

A. Only part of it.

Q. You—all you needed then after you got that timber sale of 10,000,000 feet was the camp site of Bruno Agostino, wasn't it?

A. Not at all. We didn't use it at any time. We had a better camp site than his.

Q. You crossed the creek and made one a little farther up?

A. That was our permanent campsite and still is.

Q. But you did still have to use the mouth of Mosquito Creek [360] for rafting your logs, didn't you?

A. Yes, and we still use it, yet.

Q. You saw Grasser twice in September down at Whittier, didn't you?

A. Well, we are getting confused in dates—such a progression of dates that it might require clarification and study a little bit—twice in September, it could have very possibly have lapsed over into October.

Q. You testified that you saw him twice—once in September and he wanted to get you to furnish a tug and a scow or something?



(Testimony of Thomas A. Morgan.)

A. That is right.

Q. And you wouldn't do it at that time?

A. Correct.

Q. Now, then, you said later in September you saw him again there?

A. To be specific, when I say "approximately" I mean in that neighborhood—in that range—that period—close by.

Q. Did you talk to Ray Grasser at any place else between July of 1948 and October 1948?

A. Other than the two times I saw him at Whittier, you mean?

Q. Yes.           A. I don't recall.

Q. Did you send him any telegrams or letters during that time?

A. I don't recall. I might have done so.

Q. Did you have any telephone conversations with him? [361]

A. It seems to me that now that you have brought it up that he did call there once before coming down, but the contents—the text of the message—is not clear to me, because what he had in mind we were not interested in, if it was a proposal. It might have been a proposal on these barges and boats which were terminated very shortly.

Q. He did go down there early in September with the intention of using your boat and barges to bring out of there the caterpillars and the donkey engine and you stopped that, is that right?

(Testimony of Thomas A. Morgan.)

A. That was his proposal.

Q. Now, do you have any idea why he came to you to get you to furnish the boat and barge to bring them out?

A. I have an idea that he knew at that time that the contract had not been completed by Mr. Bruno. We had no further interest in them.

Q. And your thought of it is that he knew that you and Bruno were fussing over the contract and that he thought you would furnish the barge and boat to remove part of this equipment, is that what your idea was?

A. He must have known that we were through conclusively because certainly we would not have released them to him otherwise.

Q. Why do you say you would not have released them to him otherwise?

A. Had we been involved in the matter and our attorney had [362] not informed us that the contract could not be completed, why we would certainly have been responsible.

Q. You were in possession of them there?

A. Not at that time; they had been returned.

Q. You had the whole and sole possession of the entrance of Mosquito Creek all in there?

A. That is not correct. There is lots of room there, plenty of room for two or three operators.

Q. To operate on the bank, is that right?

A. Not on the bank. There is a big slew and that

(Testimony of Thomas A. Morgan.)

pond you refer to.

Q. That slew was 20 foot wide, I believe Mr. Jacobsen said.

A. He said the creek, when the tide was out it was 20 feet.

Q. And there was lots of room for other people?

A. When the tide is in we do our rafting. You could to——

Q. Do you have any other explanations to make to this jury why this fellow, Ray Grasser, was down there to meet you twice and why this equipment disappeared? Do you know any other reason why it would have happened other than to help you out of the trouble you were in?

A. He did not come to me twice. He did come, as I mentioned before, the second time to merely pass through. I saw him get on the boat and leave in the direction of Barry Arm.

Q. But you happened to be at Whittier both times? A. That is right. [363]

Q. And you are a very busy man and travelling all the time?

A. I might explain that during that time Mr. Rowell took an interest in another sawmill outside and until I could secure relief I was stationed there in September and I was very closely confined to that particular unit at that time.

Q. Do you know where they went—where the caterpillars and the donkey engine went to?

A. No, I have been curious. I have never heard.

(Testimony of Thomas A. Morgan.)

I would like to know.

Q. You don't have the slightest idea in the world where they are today, do you?

A. That is absolutely correct.

Q. And you are just as positive about that as other things you have testified to? A. Right.

Q. You do know that this suit was filed against you and you were served with summons when it was filed? A. That is right.

Q. You do know that more than a month prior to the time the suit was filed that you and Bruno were at outs over this matter, don't you?

A. By "outs" I don't know what you mean. I did know a month before the suit was filed that Bruno would not comply with his part of the contract and that there was no contract and that we had returned the tractors—put them back—and terminated the deal completely. [364]

Q. Now, you took the tractors over there and you didn't do any work on them, you didn't put any equipment on them, because the equipment that you ordered was for a D.R. and not a D.R. 8, isn't that correct?

A. No, that is not right. We possibly got some parts that were wrong but a lot of them were finally secured. It was an old, obsolete model.

Q. And you got them all—the correct amount?

A. They came in over a period of time and a lot of them are still on there, if you can find the tractors, because they were put on there.

(Testimony of Thomas A. Morgan.)

Q. They were put on by you or your men?

A. By our two mechanics under the direction of our foreman.

Q. And you think they were still on there when the caterpillars and the donkey disappeared?

A. I was so informed.

Q. Now, what is this other equipment that you have down there that you ordered?

A. I am not sure of the specific items. They were left in Bruno's shop but as I recall there were a lot of rollers that came in during even early September and were taken out there even though we had returned the tractors and knew the deal would not be completed.

Q. Do you know Mr. Brown of the Elemar Packing Company?      A. Yes. [365]

Q. Is he a close friend of yours?

A. No, only an acquaintance. We do business with Elemar Packing. He comes over and buys some lumber.

Q. Did you see him along in September of 1948?

A. I am under the impression that it was a little earlier than that, possibly August.

Q. August or September, then?

A. Possibly August.

Q. Did you see him about the same time that Grasser—Ray Grasser—came down there to come to your place?

A. I don't remember that, don't remember seeing him again.

(Testimony of Thomas A. Morgan.)

Q. There wasn't anyone with Grasser when he came, was there?

A. He could have been on the boat but I don't recall seeing him ashore. On the Mabina Oho who came over from Cordova.

Q. Who runs that boat?

A. It is owned by Alaska Allied Industry and operated by them with Jack Bowers at that time was the Captain.

Q. Who is the Alaska Allied Industries? Who is the person that is the principal owner?

A. Bowers is also the manager. It is a group of G.I.'s who came over from Honolulu in about 1947 and started this operation there. They conduct salvage operations and do a little bit of logging and towing and so forth.

Q. Did they ever log or tow for you any?

A. Yes, they did get out a few logs. [366]

Q. In 1948?

A. They produced some logs but the one raft they turned out was not delivered—yes, it was, it was delivered just the other day.

Q. I believe you stated that the R.D. 7 caterpillar was basically sound. Did you ever hear it run? A. I did.

Q. Did you see it operate?

A. I saw the boys turning it over and trying it out probably sometime in August up in our shop.

Q. Now, what would a big 8 caterpillar weigh?

A. I believe the weight of that particular ma-



(Testimony of Thomas A. Morgan.)

chine is in excess of 20,000, probably 22 or 23 without the accessories. Put on the blade and the towing winch it would be about that.

Q. What do they sell for now, what would a D.R. cat of similar size sell for now?

Mr. Boochever: Object to that as irrelevant.

The Court: Overruled.

A. I believe the new S-R.B., eighteen thousand.

Q. Well, that is without the blade and the other attachments, isn't it?

A. I had reference to a logging unit which would include the blade and the drum.

Q. Eighteen thousand for a D-8?

A. But you are not comparing a new one with that machine?

Q. I am just asking what a new one would cost, is that right? [367]

A. Approximately there.

Q. Here in Alaska for that price?

A. The latest prices would have to be checked because we haven't bought a machine for several years. We have bought a number of—

Q. What does an R.D. 7 sell for now?

A. As I recall it we bought one last year and as I recall the price at that time was about sixteen thousand in Seattle which would make it about, oh, about six or eight-hundred more up here.

Q. Approximately \$17,000 delivered here?

A. Approximately. Therefore an 8 might be worth a little bit more.

Q. The facts are that a D.R. sells for \$22,750 in

(Testimony of Thomas A. Morgan.)

Anchorage, is the price delivered in Anchorage, isn't it?      A. It would be—it could be.

Q. I believe you stated that neither one of these caterpillar tractors had blades?

A. That is right.

Q. Neither, there was no blade there at all?

A. If you are referring to the old, home-made blade that was broken and cast aside by the shop, I will qualify it. It could not be used and was not so equipped.

Q. Did you put blades on them?

A. We didn't have the opportunity. We didn't get past the [368] engine. We just started to tear them down and work on them.

Q. You didn't put any equipment on them outside of some repairs?

A. They started to work on the tracks, the rollers and so forth, brackets and a few track links and pins and things like that.

Q. You are sure, though, that there was no blade on either one of those caterpillars? You inspected them to see?

A. There was none when I saw them. This old D-8 blade was there but it had been broken and it was a home-made blade and could not be used.

Q. So far as you know it was never put on the caterpillar?      A. That is correct.

Q. Do you remember talking to Bruno, Agostino and Mr. Blacky Lambert that day on the 10th day of April, 1948, at Barry Arm camp about the little

(Testimony of Thomas A. Morgan.)

ten by fourteen or ten by twelve cabin that Bruno always claimed as his own cabin, do you remember that being discussed there?

A. Nothing about this specific cabin. I remember talking about the equipment and various pieces of machinery.

Q. Just to refresh your memory did you say this or this in substance to Bruno Agostino in the presence of Mr. Lambert that you didn't want that little cabin; that he could keep that; that you didn't care anything about it?

A. I told him that I didn't want any part of his equipment or [369] buildings.

Q. Answer the question, please. Did you tell him that about the little cabin?           A. I did not.

Q. You did not. Was the little cabin mentioned in the conversation there that day?

A. Not to my knowledge.

Q. Well, you didn't tell them that you didn't want any part of it when you already had it, did you? You didn't tell them that there?

A. I don't understand your line of reasoning, Mr. Bell.

Q. You were in possession of everything, your men were there, and they were cutting logs and the works was going on, you didn't tell Bruno "You are blind, I haven't got this——".

Mr. Boochever: I object to counsel making a speech here.

The Court: Objection is sustained.

(Testimony of Thomas A. Morgan.)

Mr. Bell: Exception.

Q. Did you tell Bruno that or that in substance?

A. We were in possession of our own logging area—our camp—on the other side of Mosquito Creek. We had nothing whatever to do with Bruno's camp. We were in possession of nothing that belonged to him.

Q. Where was Bruno that day that you were talking?

A. Sitting on a log, as I recall, on the beach.

Q. Near his camp house? [370]

A. Not far away, 100 yards, perhaps.

Q. And the landing beach—the air landing strip—is in front of his place?

A. No, there is no strip; it is just a beach.

Q. And that is the only place you can land there?

A. No, no I wouldn't say that it is just like any other beach, there is other areas, other places.

Q. There is some over around over by Cordova, is there?

A. All around Prince William Sound.

Q. You had already moved in, unloaded your bunkhouses, unloaded your barges and had your men working when you were talking to Bruno on the 10th, weren't you?      A. Yes, in our area.

Q. And that was what you wanted was to get in and get possession, wasn't it?

A. Not possession of his camp.

Q. You wanted possession there so that you could operate, didn't you?

(Testimony of Thomas A. Morgan.)

Mr. Davis: Your Honor, I think it might be a good idea at this time to have counsel state what he means by "possession"?

The Court: Objection is sustained.

Mr. Bell: Exception.

Q. Why did you agree to furnish Blacky Lambert two caterpillars and testify awhile ago that one was all that was needed?

A. If you can call a discussion an agreement perhaps you would [371] have figured it out that way, but I did not agree. We had discussed the progression of our logging operation for the season. We bought one new unit because we were not through at King's Bay where we had two other D-7's that would be finished in the middle of the summer. And I said then if there yardage progressed that they had logs cold-decked ahead of the yardage we would shift another machine into that area.

Q. When did you receive your papers showing the timber sales to you or to your company in that area from the Forestry Department?

A. Mr. Bell, I can't tell you the exact date, it was fairly early in the year.

Q. Was it in March?

A. Seemed like the bids were opened in February. The contract might not have been signed by the Forest Service. Sometimes there is quite a delay. If Mr. Hansen and Mr. Berbick are away it could easily have been a month after that, but we

(Testimony of Thomas A. Morgan.)

are notified of acceptance when our bids are received and they are opened.

Q. You stated you sent a telegram to Lambert. What date did you send that?

A. I would say approximately the first of April, thereabouts, after I returned to Juneau and talked with the Forest Service pertaining to our contract and rights to Barry Arm.

Q. To refresh your memory, wasn't that the 23rd of March that [372] you sent the telegram?

Mr. Davis: Your Honor, if he has a telegram possibly he ought to show it.

The Court: Yes, if you have a telegram.

Q. (By Mr. Bell): Do you know where the telegram is, Mr. Morgan? A. No, I do not.

Q. You did have it in your possession, didn't you? A. The telegram I sent?

Q. Yes—no, after it was received by your employees—Lambert and Rowell.

A. I have never seen it.

Q. You have never seen that since?

A. Not to my knowledge.

Q. Do you know where it is? A. I do not.

Q. You know that it was shown to Bruno Agostino by Ted? A. I was told that it was.

Q. And you don't know where it is today?

A. I do not.

Q. You do keep all those records, don't you?

A. We try to but I tried to find that message so I assume that you have it.



(Testimony of Thomas A. Morgan.)

Q. And you know that Lambert testified that he showed it to Bruno and that Bruno gave it back to him and that he took it [373] back to Whittier, you heard that testimony of Lambert's didn't you?

A. I believe that something to that effect—

Q. Have you made any effort since that time to get it from Whittier up here?

A. I certainly have; in fact I thought Mr. Rowell had it and he would testify and he claimed that they did take it to Barry Arm and where it was put subsequently we don't know, but maybe the Signal Corps would have a copy of it.

Q. Do you know where it was sent from?

A. Well, it may be that I sent a message from Seattle as well as from Juneau. As I recall I sent one from Juneau after I returned and I am not sure about sending one to Seattle.

Q. And did you send that to Whittier?

A. That is right.

Q. And you addressed it to whom?

A. I am—

Mr. Boochever: Some time ago the objection was made that if the counsel is questioning the witness about some telegram he should show it to the witness. I believe Your Honor has sustained that.

Mr. Bell: Of course we don't have it or we wouldn't be trying to get it. We don't have it at all.

Mr. Boochever: That is very well, then, Your Honor.

(Testimony of Thomas A. Morgan.)

Mr. Bell: I ask counsel for defendant to deliver the telegram. [374]

Mr. Boochever: We do not have the telegram. We have made every effort to locate and cannot locate that telegram. We assumed that Mr. Lambert still had it.

Q. (By Mr. Bell): Don't you remember where you were when you sent that telegram?

A. I send telegrams every day, possibly half to different places. I might have sent a telegram to Mr. Lambert or Mr. Rowell the day after receiving the telephone call because I remember being very much upset as to what was taking place up there. I do remember sending the telegram from Juneau after I talked to the official of the Forest Service as to our position and rights at Barry Arm.

Q. You never did send a telegram to Bruno, did you?           A. No.

Q. And you never sent one to Mr. Socha at any time?

A. I wouldn't say at any time because I have been dealing with these boys for several years.

Q. I mean at any time during the month of March or April, 1948.

A. It doesn't occur to me that I did. I have no record of such a telegram.

Q. Did you know anything about a telegram coming to Mr. Agostino about his timber permit and coming and being in your [375] office there in Whittier and later brought out and delivered to Bruno

(Testimony of Thomas A. Morgan.)

Agostino? I believe the telegram would be addressed to Agostino.

A. Supposed to have been sent by me?

Q. No, sent by the Forestry Department or possibly from Juneau any way?

A. No, I don't know about that.

Q. Never saw that telegram?

A. Never heard about it.

The Court: Any further direct examination?

(No response.)

Any juror may ask a question if he desires. The witness will not answer until I have a chance to rule upon it.

Juror: No. 6: If it is proper could he tell us if the six barrels of oil and the barrel of gasoline been returned, does he know?

The Court: He may answer, if he knows anything about it.

The Witness: Your Honor, I am not too sure. In our contract with Mr. Lambert, it provided for him——

Mr. Bell: I object to him making a speech.

The Court: Overruled.

The Witness: He is to supply—he is to pay for all his supplies—gas, oil.

Mr. Bell: I object to him making another speech, Your Honor, and ask that he answer the question. [376]

The Court: Overruled.

Mr. Bell: Exception.

(Testimony of Thomas A. Morgan.)

The Witness: He sends his requisition to us and we fill them for him. Whether he returned that six barrels of oil I do not know. Ordinarily he would.

The Court: Any other questions?

Q. (By Mr. Bell): Do you remember, Mr. Morgan, meeting Mr. Ross in the office of McCarrey in Anchorage?

A. I believe I do remember. We had a brief meeting there sometime in the fall.

Q. And that was for the purpose of discussing this case?

A. Whether Mr. Ross was there during one of the numerous visits when I called at Mr. McCarrey's office I am not in a position to say.

Q. He didn't make enough of an impression on you as to whether he was there or not?

A. He is big enough, but——

Q. Do you remember that that was the occasion for the meeting was to discuss a settlement of this matter before suit was filed?

A. Well, it would have been dismissed from my mind. Such a settlement never needed to be discussed about the case.

Q. I will ask you if you didn't tell Mr. Ross then that you had signed this contract? [377]

A. Well, if it came up in the discussion I certainly would have told him so, that is right.

Q. And you didn't show him the contract or give it to him or anything but you did tell him that you had signed it?

(Testimony of Thomas A. Morgan.)

A. Mr. McCarrey had it, he may have shown him.

Q. I am not asking him; what did you—did you tell Mr. Ross that you had signed it then?

A. I don't recall personally having mentioned it.

Q. You don't?           A. No.

Q. Do you remember whether you showed it to him or not or anything like that?

A. No, Mr. Bell. That is something I assumed that he knew all about. Mr. McCarrey had represented us throughout.

Q. And you were there on purpose to meet—. Was Mr. Agostino up there?

A. I don't recall having seen him during that period.

Q. Was George Grigsby there?

A. Well, people came and left regularly.

Q. Was George Grigsby with Mr. Ross in meeting you?

A. Now that you mention it, I believe he was.

Q. And you can remember that you did see Mr. Grigsby there?

A. Yes, I believe that George Grigsby was there. I know him well and I remember now he was there briefly but as I recall left quickly—left after a short time. [378]

Q. Was that before or after this suit was filed?

A. That I am unable to say because I don't have the date handy.

Q. Can you give us approximately the date that you met there?

(Testimony of Thomas A. Morgan.)

A. Well, it was sometime, I would say, in the early fall.

Q. Do you remember the purpose of these gentlemen coming up there and meeting you at your attorney's office? Do you remember why you met there?

A. Possibly they had that in mind and Mr. McCarrey had asked them to come over, I don't know for sure, because I remember going from the train to the office because Mr. McCarrey had told me on the 'phone he had several things he wanted to go over with me.

Q. You came from Whittier up here to discuss the settlement with the Agostino attorneys, didn't you?

A. I was en route to Juneau. I usually call at our attorney's office and yard.

Q. Do you know whether that is right or not? Didn't Mr. McCarrey call you down at Whittier and you came up on the train for the purpose of meeting these men and for the purpose of seeing if a settlement could be made?

A. I remember the telephone call and I remember going there. To my way of thinking it was not specifically to see these gentlemen or to work out a settlement.

Q. You never paid them any money there, did you? [379]

Mr. Boochever: I think he should let the witness answer the last question—complete it. The witness was still talking.



(Testimony of Thomas A. Morgan.)

Mr. Bell: I am sorry. Is there something more you want to say about it, Mr. Morgan?

A. No, you may proceed, Mr. Bell.

Q. You didn't pay any money for Bruno Agostino there, did you? A. No.

Q. You didn't offer to pay any? A. No.

Mr. Bell: That is all.

The Court: Counsel for defendant may re-examine.

### Redirect Examination

By Mr. Boochever:

Q. Now, Mr. Morgan, there was considerable discussion by Mr. Bell with you about Mr. Butcher, when you saw him, Mr. Agostino, and at the time this contract which was later reduced to writing was drawn up. Now at that time did Mr. Butcher represent you as your attorney?

A. No not at all.

Q. Whom did he represent?

A. Mr. Agostino.

Q. And did Mr. Butcher at any subsequent time ever represent you as your attorney? [380]

A. No.

Q. Has he ever represented you as your attorney? A. Not to my knowledge.

Q. And does he represent you as your attorney now? A. No.

Q. During all of these proceedings did he at any time represent you? A. No.

Q. Now during that period of time was Mr.

(Testimony of Thomas A. Morgan.)

Butcher to your knowledge aware of the fact that Mr. McCarrey was your attorney?

A. He was.

Q. Now I believe Mr. Bell in referring to your April conversation with Mr. Agostino ask one question something to the effect did you know that you had a R. D. 7 and R. D. 8 near there and you say—I don't remember your exact answer—"Yes there was one near there." Did you mean that was your R. D. 7 and R. D. 8 or not?

A. If the question was asked and answered that way of course it was obviously wrong because I mentioned we were close to Bruno's camp. His tractors were there. Our tractor which had been landed was probably close to a mile away. They were undoubtedly his tractors that I was referring to.

Q. Now he asked you if you ever notified Bruno or anyone representing him that you had signed these checks before the [381] suit was filed. Now, do you recall ever having notified him or his attorney?

A. Well, of course, we notified his attorney. We have a letter proving that.

Q. I ask you to read to the jury from the letter of July 19th, 1948 what you wrote to Mr. Harold Butcher and testify that you mailed to him—the next to the last paragraph.

A. "I have signed a check in the sum of \$3300 and left it with Mr. C. B. Summers with instructions to pay it to the Clerk of the Court upon

(Testimony of Thomas A. Morgan.)

your giving him an acceptable list of all of the personal property which Columbia Lumber is to get under the contract.”

Q. And that letter was sent to Mr. Butcher?

A. That is right.

Q. Now, is it possible for two logging outfits to operate logging camps in the vicinity of the mouth of Mosquito Creek?

A. Apparently there is still a misunderstanding of the situation there. The answer basically is yes. I could explain it more in detail if you have the time and wanted me to.

Q. Well, explain what you mean by two outfits could operate there?

A. Mosquito Creek meanders down the valley and about a quarter of a mile up it enters a slew and a large area that is flooded at high tide. When the tide comes in it is like a big lake. There is an immense area covered by water to the extent of, [382] perhaps, 7-8 or 10 feet, so probably 12 to 15 rafts could be stored in there and two or more operations could boom logs successfully and during the rushing of the tide we don't boom anyway. It has to be rafted at high tide and almost on slack water because the currents are too strong. So operators could store their logs in booms along that slew at high tide.

Q. Did you have any need of Agostino and Socha's camp in the spring of 1948 or at any time?

(Testimony of Thomas A. Morgan.)

Mr. Bell: I object to that as a conclusion, just a conclusion of the witness.

The Court: I think it is proper. Overruled.

Mr. Bell: Exception.

A. We did not.

Q. (By Mr. Boochever): Now, Mr. Bell asked you some questions about Mr. Grasser in regard to his taking away his tractor and donkey. Did you ever call Mr. Grasser, get in touch with him or in any manner ask him to take away that tractor and donkey? A. Absolutely not.

Q. Did you in any way cooperate with him in taking away the tractor and donkey?

A. Certainly not.

Q. Now, in regard to the Elemar Packing Company, did you in any way induce or attempt to get them to take away their tractor? [383]

A. I did not.

Q. Did you in any way cooperate with them in getting away their tractor? The way they claim? A. I did not.

Q. You stated that during the period you had the two tractors that you repaired them. Where were some of the parts purchased that went into those tractors?

A. Principally from the Northern Commercial Company.

Q. Now, there was some testimony in regard to the value of a D-8 tractor and the value of a D-7 tractor new at this time. I believe you testified

(Testimony of Thomas A. Morgan.)

you thought it was about \$18,000 and Mr. Bell testified that it was about \$22,000 for a D-8 and that a D-7 was at the value of about \$16,000. Now, how do those values compare with the tractors which Bruno had at the camp in the spring of 1948?

A. Well, it would be like comparing a Model T Ford with a new streamline convertible. The values are nowhere comparable. Their cat was over ten years old. Ours was, of course, a brand new machine.

Q. Now, in regard to the values of their cats, do you know what the normal life of a cat according to the depreciation schedules figured out by the Internal Revenue Bureau is?

Mr. Bell: I object to that. It would not be controlling here.

The Court: Objection is sustained. Internal Revenue [384] Bureau may have a formula all their own.

Q. (By Mr. Boochever): What is the normal depreciation—the normal life of a tractor figured as far as depreciation is concerned?

Mr. Bell: I object to that for the reason he has not shown himself qualified to testify on that line.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Do you know what a normal life of a D-8 or D-7 caterpillar tractor is?

Mr. Bell: He hasn't qualified for answering that question.

(Testimony of Thomas A. Morgan.)

The Court: I think anybody might learn that.  
Overruled.

A. That would require qualifying. It would depend almost entirely upon the upkeep and the work being performed. Would you mind giving me that question again?

Q. (By Mr. Boochever): Do you know what the normal life of a caterpillar tractor is as figured on a depreciation schedule?

The Court: Wait a minute. I think counsel had better specify whether the cat is in storage all the day or whether it is used and if used how it is used.

Mr. Boochever: Thank you, Your Honor.

Q. Used in logging operations in Alaska?

Mr. Bell: Object to that. There is no showing how the caterpillars here were used or anything about their former use [385] or whether they were used at all.

The Court: Overruled.

Mr. Bell: Exception.

A. Five years.

Mr. Boochever: No further questions, Your Honor.

Mr. Bell: I have some now since he has gone into another field.

Mr. Boochever: I object to counsel's remarks, Your Honor.

The Court: Overruled.



(Testimony of Thomas A. Morgan.)

Recross-Examination

By Mr. Bell:

Q. Now, Mr. Morgan, the life of a caterpillar would depend a good deal on the use and the kind of use it had?

A. I agree, Mr. Bell, it depends a lot on the upkeep. We write ours off after five years.

Q. You do that for income tax purposes?

A. And for the reason that at that time their——

Q. What do you do with them at the end of five years?

A. We dispose of them as best we can.

Q. Sell them as second-hand caterpillars?

A. Not always. One camp I might state, we are using one as a double-drum unit. We mounted a double drum on the back end of it, using the motor only.

Q. How old a cat is that one?

A. I think that one has gone into about its sixth or seventh year. [386]

Q. That was used about five years extensively in the timber woods?

A. Four or five and since then it has been used to handle this double drum but not in the woods.

Q. What is this double drum used for?

A. For bringing in logs from isolated points where the tractors can't reach out and sometimes in yarding to a spar tree.

Q. It is still in use then, of course?

(Testimony of Thomas A. Morgan.)

A. To a reasonable extent.

Q. How old a cat have you ever seen in use?

A. Well, I have seen one of Mr. Bruno's tractors operate and it is over ten years. I know that. That is about the oldest I have seen.

Q. Do you know it is over ten years? How do you know? A. I was informed.

Q. Someone told you that?

A. No, someone in authority.

Q. Who was it told you that?

A. Mr. Wynn Irvin of the Northern Commercial Company.

Q. And he told you that Bruno Agostino's Caterpillar down there at Barry Arm was over ten years old? A. That was what I was informed.

Mr. Bell: I move to strike his answer because it shows now that it is not competent.

The Court: Overruled. [387]

Q. (By Mr. Bell): You stated to your attorney that you didn't request Elemar Packing Company or Ray Grasser either to take any of that equipment out, that is right, is it?

A. That is correct.

Q. You said awhile ago that you knew Grasser was going in there to get the equipment because he propositioned you to use your equipment to get it? A. Right, you are.

Q. And you didn't do anything to stop him, did you?

A. I had no authority. I was informed I had none.

(Testimony of Thomas A. Morgan.)

Q. Now you told this gentleman that you never did in 1948 need Bruno Agostino's camp at all. Why were you so perturbed, I believe is the word you used, when these gentlemen called you on the 'phone down in Seattle, Washington and told you that Bruno wouldn't let them in there if you didn't need that? Why were you so perturbed, can you explain that?

A. If you don't know, Mr. Bell, I think it is the normal reaction of any man when he has a perfect right under a contract to accomplish a certain purpose and a man by force tries to keep him from doing that, I think any man would resent it.

Q. Why did you make some deal to land if you had a perfect right?

A. We made no deal, Mr. Lambert proceeded into the area in which he was entitled to. [388]

Q. Why did you tell Mr. Lambert and Mr. Rowell to go and tell Bruno Agostino that you would be up on the 10th and settle with him or make some deal with him? Why did you tell them to do that?

A. Apparently the word "settle" has bothered us. There admittedly was a dispute. He kept us out of the area we wanted to go in and go about our business. I wired them I would come up but I don't recall using the word "settle."

Q. Why did you send them down there—send to tell them that, if Bruno didn't have any prior rights, you didn't need to, did you?

(Testimony of Thomas A. Morgan.)

A. I told them to take word from the Forest Service on our contract to show him that we had a right and possibly further to tell him that I would be up to see what his contention was.

Q. You didn't have any intentions of paying Bruno on the 10th?

A. I had the remotest idea that there would be a deal. I mentioned before we had no use for his equipment or his camp, everything had been arranged prior to that where we could go ahead with our crew.

Q. Who was it, do you think, that caused Mr. Lambert to believe that it was your intentions to buy Bruno out for the price that he had asked? Do you know how he came by that opinion?

A. It could only be an assumption on his part because nothing was stated to that effect or inferred.

Q. How long did he talk to you on the 'phone?

A. I don't know.

Q. Did you hear him testify that you told him to go on up there, that he told you the price Bruno wanted and you told him to go on up there and take over and tell Bruno that he would be there on the 10th and settle with him, you heard Lambert testify to that?

A. I heard testimony similar to that.

Q. Do you know how Lambert came to think you said that, did you say anything like that?

A. Mr. Lambert to my knowledge testified noth-

(Testimony of Thomas A. Morgan.)

ing of the fact, in fact, he later testified that there was no deal.

Q. And he explained that in his last the reason he said that there was no sale that you didn't explain, isn't that what he explained?

A. Not to my knowledge.

Q. But you just now stated that Lambert later testified that there was no sale. You testified to that, didn't you just now? A. Testified—?

Q. That Lambert testified that there wasn't a sale, you just now testified to that, didn't you?

Mr. Davis: Your Honor, I think that the matter of what Lambert testified to or what he didn't is known by the jury and I don't think we should go at this time into what Mr. Lambert?

The Court: This question may be answered.

A. I was trying to recall what was said. It was confusing [390] what had been said. The actual testimony in detail would have to be read to refresh me exactly as to the words used.

Q. You did hear Mr. Lambert testify yesterday or day before yesterday that what he meant by no sale was that you didn't pay for the——

Mr. Boochever: Now, Your Honor, I wish to object again on the same grounds as Mr. Davis.

The Court: Sustained.

Mr. Bell: Exception.

Q. These caterpillars, they can be reconditioned and be put in pretty good order, can't they?

A. An old tractor can be rebuilt to an extent.

(Testimony of Thomas A. Morgan.)

Q. And they are rebuilt quite often, aren't they?

A. Occasionally, if you want to spend enough on them.

Q. You were willing to spend \$2,000 on putting those two caterpillars in, as Lambert said, first-class condition, you were willing to do that, weren't you?

Mr. Boochever: I object to the reference "Lambert said" as calling—as including a double question.

The Court: Sustained.

Q. (By Mr. Bell): You were willing to spend \$2,000 to recondition them, weren't you?

A. Under the terms of our agreement if we had kept the machines, if the deal had been completed, we would have spent considerably [391] more than that.

Q. You claim you did spend some money on them? A. That is right.

Q. Do you know how much you spent?

A. Approximately the figure mentioned.

Q. And you don't know how much it was, then? Just approximately?

A. That is as nearly as we could determine it from the parts purchased and the time spent in working.

Q. And you testified yesterday that the parts were still there and they didn't fit the tractor?



(Testimony of Thomas A. Morgan.)

A. I was told that some of them were still there.

Mr. Bell: I think that is all, Your Honor.

Mr. Boochever: That is all, Your Honor.

The Court: That is all.

(Witness excused.)

The Court: Another witness may be called.

CRENDA ANTON

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, please?

A. Crenda Anton.

Q. Mrs. Anton, by whom are you employed?

A. J. L. McCarrey, Jr.

Q. What is your occupation?

A. Attorney at law.

Q. For how long have you been employed by Mr. McCarrey?

A. Since February of this year.

Q. Where is Mr. McCarrey now?

A. He is in Washington, D. C.

Q. And who is in charge of his office?

A. I am.

Q. Who is in charge of the records in his office?

A. I am, too.

Q. Have I made a previous request when I first came to town here to ask you if you knew of any

(Testimony of Crenda Anton.)

checks made by Columbia Lumber Company to the Clerk of the Court or to Mr. Bruno Agostino?

A. Yes, you did ask me.

Q. Do you know where they were?

A. No, I didn't.

Q. What did you do, if anything, about it?

A. I told you that I would check the file and see if I could locate the checks, which I did, and I was unable to find them so I sent a wire to Mr. McCarrey.

Mr. Bell: Now, object to the correspondence or content of any conversation between she and Mr. McCarrey, it would not be binding on these plaintiffs unless they were present. [393]

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Continue with your answer, please?

A. I wired Mr. McCarrey and told him that Mr. Boochever had asked me for some checks from Columbia Lumber and asked him where they were and he wired me——

Mr. Bell: Now, Your Honor, I object again. I hate to stop it but the telegram would be the best evidence, if admissible at all, and this is a conversation between a stenographer and her boss and it wouldn't be binding on Mr. Agostino and Mr. Socha at all. They weren't present.

Mr. Boochever: Possibly I could reword that last question, Your Honor.

(Testimony of Crenda Anton.)

The Court: All right.

Q. (By Mr. Boochever): As a result of the wire from Mr. McCarrey were you able to locate the checks? A. Yes.

Q. Do you have them with you now?

A. Yes, I do.

Q. Were they in a file in your office?

A. Yes.

Q. May I see the checks? A. Yes. [394]

Mr. Boochever: At this time would you mark these for identification, please, as Defendant's Exhibits—they would be Defendant's would they not?

The Court: H, I, and J.

Mr. Boochever: I offer these checks in evidence as Defendant's Exhibits H, I, and J.

Mr. Bell: I object to their admission for they have never been identified by anyone yet and I object to their admission for several reasons, one, it would be a self-serving declaration; and, second, that it is incompetent, irrelevant and immaterial, no proper foundation laid and not within the issues.

The Court: The first objection is good, because they haven't been identified as being anybody's checks.

Mr. Boochever: Your Honor, we request that they be admitted subject to further identification.

Mr. Bell: We object to that.

The Court: In the face of objection I think you had better identify them before having them admitted. You may conclude your examination.

(Testimony of Crenda Anton.)

Mr. Boochever: There are no further questions to ask of this witness.

The Court: Counsel for plaintiffs may examine.

### Cross-Examination

By Mr. Bell:

Q. When did you find those checks? [395]

A. I wired Mr. McCarrey——

Q. When did you find the checks physically?

A. Wednesday.

Q. Wednesday of this week? A. Yes.

Q. You had never seen them before that?

A. I had never seen them before.

Mr. Bell: That is all.

The Court: That is all, Mr. Anton, you may be excused from further service unless you are sent for.

(Witness excused.)

### HAROLD J. BUTCHER

called as a witness herein, being first duly sworn, testified as follows:

### Direct Examination

By Mr. Boochever:

Q. What is your name, sir?

A. Harold J. Butcher.

Q. What is your occupation?

A. I am an attorney at law.

Q. Where do you practice?

(Testimony of Harold J. Butcher.)

A. Anchorage.

Q. Calling your attention to the month of June, 1948, were you the attorney for Bruno Agostino during that month?

A. Yes, I was retained by Mr. Agostino. [397]

Q. Did you represent him in regard to some property at Barry Arm?

A. If that is the property in Prince William Sound, yes.

Q. In that connection what action did you take with Mr. Bruno, what was the first thing you did for him in regard to that property?

A. Mr. Agostino came in and told me to some extent his difficulties with the Columbia Lumber Company and with the operations at Barry Arm and that he felt that the company was trespassing on his property and wanted me to start an action against them. I did as all attorneys do, I examined the facts as well as I could with the view of determining whether there was a good cause of action.

Mr. Bell: That is as far as would be permitted, Your Honor, because a conclusion of an attorney would be a confidential relationship between he and his client and we as attorneys for Mr. Agostino object to him testifying to any confidential relations between attorney and client.

The Court: Well, of course, that rule is well

(Testimony of Harold J. Butcher.)

known. I understand counsel has no objection to what already has been testified?

Mr. Bell: No, not a bit to that. I would have no objection to him testifying to the physical things that he did but the confidential relations between the two would certainly—I would object to that.

Mr. Boochever: We don't want any confidential communications, Your Honor, and, of course, we have never sought to inquire of them.

The Witness: If I may say so, I did not intend to reveal any confidential determinations on my part, just what I did.

Q. (By Mr. Boochever): What did you do?

A. As I said, I had examined the facts. I determined that the best——

Mr. Bell: I object to what he determined. That is the confidential relations between attorney and client.

The Court: Whether it is or not it is objectionable and the objection is sustained.

Q. (By Mr. Boochever): What did you do?

A. I called Mr. Tom Morgan at Juneau.

Q. Prior to that time did you make an investigation of the premises themselves that were in dispute?

A. Yes, I went with Mr. Agostino. He retained a commercial airplane here at Anchorage and we flew to Barry Arm where I covered the property with him to some extent from the beach back into the wooded area.



(Testimony of Harold J. Butcher.)

Q. When was that?

A. To my best recollection it was the last part of May or the early part of June, 1948. [399]

Q. Were the caterpillar tractors claimed by Mr. Agostino on the property at that time?

A. Yes, they were.

Q. Where were they?

A. If I remember correctly there were two sheds or buildings and there was a tractor in each shed. One of the sheds, the buildings I call a shed, might have been a lean-to, but it is my recollection that it was an enclosed building.

Q. Were any men from Columbia Lumber Company in the buildings of Mr. Agostino at that time or in the immediate vicinity of those buildings?

A. When we landed at the beach there was no one at all on the beach except Mr. Agostino and myself and Mr. Christianson, the pilot, and after going into the buildings and looking around and examining various pieces of equipment, Mr. Agostino suggested that we follow a road which led along the beach about a half—a quarter of a mile and then turned sharply left and then went up along a creek perhaps a half mile, climbing slightly upward to a point where there was a stream and some cutting going on and at the right of the stream was a camp consisting of a number of buildings?

Q. And were there men there in that camp?

A. There were quite a number of men, I believe it was the dinner hour and the evening hour, I

(Testimony of Harold J. Butcher.)

should say, supper hour, in the camp and men were going to and from the messhall and [400] the various smaller buildings.

Q. There weren't men going to and from Mr. Agostino's buildings or were there any men there?

A. Unless those buildings to the right of the stream were Mr. Agostino's there were not. I don't know whether they were or not. The buildings I saw the men going to and from were a bunch of similar buildings to the right of this stream, we had to cross a stream on a narrow log, quite difficult to cross.

Q. By the right of the stream, do you mean the right going upstream?

A. Looking up the valley, up the creek, it would be to the right.

Q. And that was how far up, did you say, up the stream approximately?

A. A half mile I would think.

Q. Did you take a picture or pictures on that occasion?

A. I took quite a number of pictures. I had forgotten to bring my own Kodak, which I had planned to bring, and Mr. Agostino had a small Kodak which he had films for and I took maybe twenty or thirty pictures in the area from his buildings and the beach on up to this other area that I have referred to.

Q. Did Mr. Agostino take any pictures?

A. No. As I recall I took all the pictures. I

(Testimony of Harold J. Butcher.)

loaded the camera and snapped the pictures. [401]

Q. I show you a picture marked Plaintiffs Exhibit No. 4 and ask you if that appears to be a picture of the buildings where you said these men were?

A. Yes, this is one of the pictures. I don't identify it so much from the buildings because there are so many buildings of that nature, but I remember this vehicle which appears to be a cart of some kind but which was a drag loaded with oil barrels right in front of the camera, as I was taking the picture.

Q. Now, Mr. Butcher, did you subsequently return to Anchorage?

A. Yes, we came back down to the beach where Mr. Christianson was waiting for us and then flew back to Anchorage.

Q. And then when you returned to Anchorage after that did you get in touch with Mr. Morgan of Columbia Lumber Company?

A. Yes, I called Mr. Morgan on the telephone.

Q. Where was Mr. Morgan at that time?

A. He was at Juneau.

Q. And did you have instructions from Mr. Agostino to call him?

A. I had instructions from Mr. Agostino to negotiate a sale, if I could.

Q. And what did you tell Mr. Morgan as nearly as you can remember?

A. I asked Mr. Morgan, I having placed the

(Testimony of Harold J. Butcher.)

call and being the interrogator, if he ever made an offer to Mr. Agostino for his [402] equipment?

Q. What did Mr. Morgan say?

A. He told me that he had not. I then asked him if he had ever made any agreement of any kind to purchase the equipment and he told me that he had not, and then I asked him if he were willing to purchase the equipment and he told me that he would be willing to discuss the terms of a deal if a deal could be arrived at and would consider it and that he was coming to Anchorage, oh, within a period of a week or ten days on his way to Whittier and he would call at my office and discuss it further.

Q. Did he come to Anchorage?

A. Yes, he did.

Q. About when was that?

A. Well, that would have been perhaps the second week in June, but I am not sure about it, it could have been the first week or the third week and it could have been the last week in May.

Q. And did you have a conversation with Mr. Morgan then?

A. I don't believe he came to my office on that trip. I believe that Mr. Agostino saw him at the hotel—at the Westward Hotel and I called him and he told me he was due in Whittier the following morning and that he would be there about three days and would be back in Anchorage and he would then come to my office.

Q. Did he then come to your office? [403]

(Testimony of Harold J. Butcher.)

A. He then came to my office.

Q. About when was that?

A. Again I am not certain, the dates are vague but it was sometime in June, perhaps the early part of June.

Q. Could it have been the end of June?

A. It could have been very easily.

Q. Who else was present in your office at that time?

A. I had arranged for Mr. Agostino to be there so that whatever discussion we had and any terms which might be arrived at could be agreed upon between the parties and we would finish with the transaction.

Q. Was Mr. Agostino there?

A. Mr. Agostino came to my office at, perhaps, a few minutes before Mr. Morgan did.

Q. Who was—who were you representing in the negotiations?

A. I was representing Mr. Agostino.

Q. What conversation occurred at that time between you, Mr. Morgan and Mr. Agostino, as well as you can recall?

A. Well, the first part of the conversation things weren't very pleasant. Mr. Morgan and Mr. Agostino disagreed with each other on several items which I don't remember the details of and finally they got to discussing the equipment and the timbering that had occurred down there and then as I recall Mr.

(Testimony of Harold J. Butcher.)

Morgan made an offer to Mr. Agostino for his equipment.

Q. And did they agree on a price for the equipment?

A. Mr. Morgan offered \$9500 or it could have been \$9000 and [404] Mr. Agostino rejected the offer because it wasn't high enough and I intervened from time to time between them and made suggestions and finally I said to Mr. Morgan "What difference does \$500 make to you; why don't you make it a flat \$10,000?" and he was rather reluctant to do so and after some more discussions he said "All right, then, I won't quibble over \$500; I will make it \$10,000." And then I turned to Mr. Agostino, "Is that figure agreeable to you?" And he said, "Yes, it was."

Q. Now, was it clear what was to be conveyed for that sum of \$10,000?

A. I think it was clear; it was all of the equipment and buildings at Barry Arm—all of the interest that Mr. Agostino had at Barry Arm connected with lumbering and timbering.

Q. And was anything said about having an agreement reduced to writing?

A. Yes. I had taken rather copious notes all along and discussed terms and I believe the financial end of it was that Mr. Morgan was to place some \$3200 or \$3300 in escrow with either the Clerk of the Court or with the Columbia Lumber Company agency here or someone else, I don't remember, until



(Testimony of Harold J. Butcher.)

a certain lien that Mr. Grasser claimed against Mr. Agostino had been settled. As I recall, Mr. Morgan stated he didn't want to buy this property on those terms and then have Mr. Grasser come along and claim some interest.

Q. Did Mr. Agostino say anything in regard to whether he had [405] a clear title to the property or not?

A. I don't recall too well the conversation on that. I know that the reason that Mr. Morgan didn't want to turn the \$3300 over immediately and he so stated was that this Mr. Grasser had a claim on the equipment either in form of a lien or part ownership and that Mr. Agostino did recognize that claim at that time, but stated that he could take care of it with Mr. Grasser. I could be wrong about that but that is my best recollection. And, otherwise, it is my impression that Mr. Agostino did have or claimed to have title.

Q. Then did you subsequently prepare a written contract to embody the terms of the agreement?

A. I asked Mr. Morgan if it would be satisfactory that I draw the contract or did he want his own attorney to prepare it or assist in preparing it and he said "No, if it sets forth the terms as agreed upon it will be satisfactory to me and when it is prepared and ready for my signature send it down to Juneau."

Q. Now, did you draw a written contract?

A. I did draw a written contract.

Q. I show you Defendant's Exhibit No. B and ask you if you can identify it?

(Testimony of Harold J. Butcher.)

Mr. Bell: Your Honor, we admit that is the contract he drew.

Mr. Boochever: If that is admitted that is fine.

The Court: It is admitted that Defendant's Exhibit B is [406] a contract drawn by Mr. Butcher.

Q. (By Mr. Boochever): Mr. Butcher, did you include in that contract a specified list of equipment that was to be conveyed?

A. I didn't list the equipment by items of supplies or items of equipment or machinery or anything of that sort because I didn't have such a list. The only information I had at the time and apparently the only information that Mr. Agostino was able to give me was a general reference to all of the equipment and buildings at that point and I have not seen this contract probably for a year but it is my recollection that I referred in the description of the property to all of that certain equipment and buildings located on Barry Arm. Now I would have to see the contract to know that for sure.

Q. Now, Mr. Butcher, did you write to Mr. Morgan and send him—just a second, so that it won't be leading—. Did you notify Mr. Morgan that you had a written contract?

A. I wrote a letter—let me see, I first called Mr. Agostino in the office and we read the contract and it expressed the terms as he understood it, and it is my recollection he signed it but there I could be wrong again.

(Testimony of Harold J. Butcher.)

Q. I show you the contract, Defendant's Exhibit B, and ask you if you can identify the signature on the last page thereof, the first signature?

A. Well, that was probably the first time I ever saw Bruno's— [407] Bruno Agostino's signature and I have never seen it since that same period of time, but I know that by my name appearing on there as Notary that it was his signature and it was signed in front of me.

Q. And did he acknowledge that he agreed to that?      A. Yes, he did.

Q. Now, one other thing, Mr. Butcher, the date here is the 29th day of July, 1948, do you know whether that date is correct in all probability or whether that is a typographical error?

A. May I see that again?

Q. Yes.

Mr. Boochever: I think I can refresh the witness' memory.

Mr. Bell: I don't think he needs any refreshing; he is a very able man.

A. Well, the date "29th" is my handwriting but that would appear to be at least a month later than this transaction occurred. I say that because on the 1st or 2nd day of July I had been elected at the Territorial Democratic Convention as Chairman of the Democratic Delegation to the National Democratic Convention at Philadelphia, which was on the 12th of July and I left here on the 2nd or 3rd of July, it could have been the 1st, but I believe

(Testimony of Harold J. Butcher.)

it was a day or two after the 1st, and I know before the 4th of July, and flew outside stopping at my home town, Ogden, Utah, and then later going east. And I was in Philadelphia until about the 20th of July and then came back by way of Utah again [408] and California and Seattle and I was gone about five weeks altogether. I had had to move my office in June or close my office in the Paddock Building because they desired to open a furniture store in the space and I had no office space to hurry back to and did not find office space until about the first of September, so I was in no hurry to return and I came home to the best of my recollection about the first week in August, so I believe that that date, 29th, should read the 29th of June and the typist apparently typed July and I didn't notice it when I signed it.

Q. (By Mr. Boochever): Mr. Butcher, I show you Defendant's Exhibit G and ask you if you can identify that?

A. Yes, this is my letter written on July 2nd.

Q. To whom was that letter written?

A. It was written to Tom Morgan, Columbia Lumber Company.

Q. Was anything sent with that letter?

A. Yes, I enclosed two copies of the partially executed contract executed by Mr. Agostino.

Q. I now show you Defendant's Exhibit No. C for identification and ask you if you can identify or have ever seen this letter before?

(Testimony of Harold J. Butcher.)

A. Yes, I remember this letter was in my mail upon my return from the States following the trip to which I referred.

Q. And did you discuss that letter with Mr. Agostino? [409]           A. Yes, I did.

Q. And was Mr. Agostino agreeable to furnishing a list as requested there?

Mr. Bell: I object to that because it would be a confidential relation between attorney and client.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, I asked Mr. Agostino the same question when he was on the stand. He denied it and he also made no claim of privilege whatsoever at that time nor did his attorney for him. He further stated, "Ask Mr. Butcher" as I recall his testimony to the best of my recollection.

The Court: If the plaintiff, Agostino, waived his privilege, of course, the witness may answer but otherwise not.

Mr. Boochever: It is my position that he did waive his privilege by waiving on cross-examination voluntarily in regard to the same conversation.

The Court: I think not. I don't consider that that is a waiver of privilege.

Mr. Boochever: Well, now, I don't want the conversation but did he furnish you such a list?

Mr. Bell: I object to that for the reason it would be a confidential relation between attorney and client.

The Court: Objection is sustained.

(Testimony of Harold J. Butcher.)

Q. (By Mr. Boochever): Did Mr. Agostino give you any instructions to tell Mr. [410] Morgan or his attorney in regard to that contract?

Mr. Bell: I object to that for the same reason.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, that is instructions to tell Mr. Morgan is what I am asking for. Now it is certainly not confidential because it is to be revealed to a third person.

The Court: Objection is sustained, whatever conversation took place between Agostino and Mr. Butcher, those relations that existed cannot be testified to by this witness.

Mr. Boochever: We ask an exception.

Q. Mr. Butcher, did you notify Mr. Morgan or Mr. McCarrey his attorney after you had talked with Mr. Agostino, did you communicate with them?

A. Yes, I communicated with both Mr. McCarrey and Mr. Morgan.

Q. What did you tell them?

A. To tell them that I was no longer representing Mr. Agostino.

Q. And did you tell him anything about the contract or the compliance with the terms of that letter?

A. Yes, I told him that I had given Mr. Agostino the best advice I was capable and that he had not followed it and that he didn't desire me to pursue further negotiations but to bring suit against the Columbia Lumber Company, and having participated



(Testimony of Harold J. Butcher.)

in these negotiations and arriving at this settlement I felt that I had rendered adequate service as attorney [411] and felt that if I went further I would not be doing my duty.

Q. Now, did he say anything—did he tell Mr. Morgan or Mr. McCarrey anything about a cabin which was——

Mr. Bell: I object to that. It would be the same thing only he is attempting to avoid the confidential relations by using somebody else's name. If Mr. Agostino said anything about it, why, it would be confidential relations.

The Court: Objection is overruled, because he can tell what he said to McCarrey. The witness can tell what he said to McCarrey or to Morgan.

The Witness: May I have the question read again?

(Question read.)

Q. (By Mr. Boochever): ——which was located at Barry Arm? A. Yes, I did.

Q. What did you tell him in that connection?

A. I told them that apparently Mr. Agostino had taken possession of a cabin on Barry Arm and would decline to permit that cabin to become the property of the Columbia Lumber Company under this contract if it were finally consummated.

Q. And did you tell them anything about a list of the equipment being furnished?

Mr. Bell: Object to it on the same ground, Your Honor.

(Testimony of Harold J. Butcher.)

The Court: Objection is overruled.

Mr. Bell: Exception. [412]

The Court: He may tell what he said to McCarrey or to Morgan.

Mr. Bell: I object to it until the time and place is fixed, please, on that ground.

The Court: Witness can fix the time and place as nearly as possible.

The Witness: Mr. Agostino did not have a telephone, as I recall, and I sent a friend of mine, loaned him my automobile, to go to Mr. Agostino's house. This was following my return from the trip outside. And told him I was anxious to see Mr. Agostino because I had this letter from Mr. Morgan.

Mr. Bell: Now, I object to what he told this person that he sent out to get Mr. Agostino because that would be purely hearsay.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, anything that this witness told him is not hearsay; that is what this witness himself said.

The Court: He is reciting something he said to a third person that he was anxious to see Agostino, which isn't evidence at all in this case.

Q. (By Mr. Boochever): Very well, will you continue in fixing the time.

A. Probably the first or second week in August.

Q. At that time when you told him, did you mention anything about the list of equipment that was requested in that letter? [413]

(Testimony of Harold J. Butcher.)

A. Yes, I told him that Mr. Agostino refused to give them a list of equipment.

Mr. Boochever: No further questions.

The Court: Counsel for plaintiffs may examine.

Cross-Examination

By Mr. Bell:

Q. Mr. Butcher, when did you last talk to Mr. Agostino before you went to the Republican—Democratic Convention—both being so close together and I was one and you were at the other, excuse me for the remark.

A. I am sorry, will you repeat your question?

Q. When was the last time you talked to Agostino before you went to the Democratic Convention?

A. Well, probably the day he signed the contract, which would be the 29th of June. I might have seen him the next day but I don't remember.

Q. Mr. Butcher, could you be mistaken about when that contract was signed? I notice that it is dated July—everywhere in the heading it is July and in the execution it is July, in the acknowledgement it is July—could you be mistaken about that in any way?

A. No, I think not. When I approach the end of the month and I am producing papers for signature, in order to avoid re-doing the papers, and I am close to the end of the month and I don't know when my client is coming in to sign and I feel it will not be the day I prepare the instrument, I usually date

(Testimony of Harold J. Butcher.)

it in the following month. For instruments that I did on the 31st or the 28th of May and along in there where I felt I would not see my client, I dated in June, knowing they would be signed in June. This was the very last of July—last of June and I believe that the reason the contract cites July all the way through was because I didn't know I was going to see Mr. Agostino on the day I did and when he did we inadvertently failed to change the word "July" to "June" and I am further convinced that it was June 29th because my letter in which I sent this signed copy or the signed copies of the contracts to Mr. Morgan was dated on the second day of July and his letter acknowledging receipt of the contracts was dated, as I recall, on the 19th. of July, which would indicate that this is the date, 29th of June, is the correct date.

Q. I hand you this instrument that has been marked Plaintiff's Identification Exhibit No. 33 and ask you to look at that and see if there is a date in that that would mean anything to you?

A. Well, there is a date in here at the beginning of the contract which says—looks to me like 5-A, but it could be 5th, but it is not my handwriting.

Q. Do you recognize whose handwriting that is?

A. No, I could not, it is just a figure.

Q. Would you look back over on the back, Mr. Butcher, on the third page, do you see the same thing over there, don't you? [415]           A. Yes.

Q. Does it look like the same handwriting?

(Testimony of Harold J. Butcher.)

A. The "5" that is not my handwriting. The "5" looks identical to the "5" on the first page but the "th" if this is a "th" on the first page is different. It could be carelessness in writing but it is in no case—neither case—my handwriting.

Q. Of course, I don't think it is material, Mr. Butcher, but I wanted to use that for a suggestion so it would help you get the dates as near correct as you can. Now, when you sent that contract to Mr. Morgan over at Juneau you sent that in June or July?

A. I sent that on the second of July because I signed the letter on that date transmitting the contracts.

Q. Mr. Butcher, this date is correct—July 2nd—on that instrument?

A. Yes, I am certain that is correct, Mr. Bell.

Q. And you enclosed a copy in that—Didn't you enclose this original and a copy in that to Mr. Morgan?

A. Well, the letter says I enclosed two copies which I had Bruno sign and that would be one of the copies there that you have, certainly.

Q. Then this original is really made with the original stroke of the typewriter—this one?

A. Yes, that is the ribbon copy.

Q. And you note that that is now signed Thomas A. Morgan. [416] Did you ever see that contract before today?      A. No.

Q. After it was executed?

A. No, I haven't.

(Testimony of Harold J. Butcher.)

Q. That was never returned to you, was it, signed?      A. No.

Q. Did you ever know about Mr. Morgan putting up any money to anybody or any checks to anyone during the time you represented Mr. Agostino?

A. It is my recollection that when I returned and found the letter dated July 19th from Mr. Morgan stating that he had placed \$3300.00, I believe, with the Columbia Lumber Company up here, their agent here at that time, their manager was our counselman, known as Red Summers—C. D. Summers, and it was my recollection I called Mr. Summers before conferring further with Mr. Agostino. In fact, I know I did because when Mr. Agostino and I differed then I called to verify the fact that the money was there, I remember that now.

Q. You say that you and Mr. Agostino differed? In other words, there was some arguments between you and some dissatisfaction between you?

A. No, I didn't say dissatisfaction, I said differences, and the differences were whether Mr. Agostino would furnish the list of equipment or whether he would not.

Q. He had told you before that he had waited long enough [417] for the money to come and that he wasn't going to wait any longer, had he told you that?

A. Yes, he might have said that. I remember him being very indignant about it and saying words to that effect.



(Testimony of Harold J. Butcher.)

Q. Do you know when you were no longer his counsel and Mr. Ross and Mr. Grigsby were employed? Do you know about that?

A. I don't know anything about Mr. Grigsby being employed. When Mr. Agostino and I parted the best of friends I explained my position to him and he was very kind and asked me how much he owed me and I told him for my effort up to date for \$100.00 and he made a promissory note not having the money at that time and I was glad to wait and he asked if I could recommend another attorney for him. He apparently relied upon my judgment in the matter and I told him to go see Mr. Ross in the Central Building.

Q. Are you sure that wasn't Mr. Roley?

A. Now, that was Mr. Ross—now, it could have been Mr. Roley but it is my recollection it was Mr. Ross.

Q. About what date was that, Harold?

A. Oh, sometime in the middle—second week or middle of August.

Q. You are sure?

A. No, I am not sure of it. I only think it might be, due to the circumstances surrounding my return.

Q. Now, after you got that letter from Mr. Morgan, do you [418] know how he got it back from you—the one that you testified about? I hand you Defendant's Exhibit C, which is a letter dated July 19, 1948. I believe you testified you received that through the mails from Mr. Morgan? A. Yes.

(Testimony of Harold J. Butcher.)

Q. Do you know how Mr. Morgan got possession of it?

A. Well, I don't know how Mr. Morgan got possession of it. I know how I did get dispossessed of it.

Q. How did you get dispossessed of it?

A. As I explained earlier, when I returned from the States I had no office and I maintained my office in my home for quite a while and as a result of it my papers were greatly confused. When Mr. Agostino and I parted company, he naturally wanted his papers and I was glad to give them to him, including the pictures and anything else I might have had. Sometime afterwards after I had located an office next to the Bootery on "G" Street I discussed this matter with Mr. McCarrey and Mr. McCarrey at that time, to my best recollection, inquired if I had anything that might throw light on this situation and I believe at that time I turned over to Mr. McCarrey this letter. And I believe I had another letter written to me from Frank Heintzleman, the Chief Forester for Alaska at Juneau and I think I turned that over at the same time to Mr. McCarrey but I could have turned that over to Mr. Agostino. I am just vague about it, but I am certain that is how I lost control of the letter. [419]

Q. You think you gave it to Mr. Morgan's counsel, then, Mr. McCarrey?

A. To Mr. McCarrey.

Q. He was Mr. Morgan's counsel?

(Testimony of Harold J. Butcher.)

A. Yes.

Q. How early in the year did you know that Mr. McCarrey was representing Mr. Morgan in this controversy?

A. Oh, I think I knew that right to begin with because when Mr. Morgan came up the first time and didn't come to my office going to Whittier instead, I think Mr. McCarrey told me at that time that he represented Mr. Morgan or would represent him in this matter.

Q. Could you be mistaken, Harold, about telling Mr. Agostino about that particular letter or were you talking about the letter you wrote to the people—

A. I couldn't be mistaken at all about telling Mr. Agostino that Mr. Morgan wanted a list of the equipment.

Q. No, I don't mean that. Could you be mistaken about telling Mr. Agostino that you had that letter in your possession?

A. That is what I was answering. I couldn't be mistaken because the only knowledge I had that Mr. Morgan wanted a list of equipment was from this letter and Mr. Agostino and I had differed. Our only difference was over that list of equipment.

Q. Well, did you feel, Mr. Butcher, that you should give your clients'—your clients' information to the opposing [420] counsel in this matter?

A. Well, Mr. Morgan had written this letter to me. There was no confidential information in this

(Testimony of Harold J. Butcher.)

letter. It was simply stating his desire for a list of the equipment and restating the terms under which he had entered into the contract. And Mr. McCarrey being somewhat in the dark about it at that time. I am not certain that is how he got it but that is my recollection that is how it happened, so that he would be informed as to what had actually happened. I don't know whether he promised to return the letter to me or not, but I am certain that that is the way it came in his possession.

Q. You are quite sure you didn't give it to Mr. Morgan at any time?

A. I am certain I didn't give it to Mr. Morgan.

Q. And if he had it here in Court he must have gotten it through some other source?

A. As a matter of fact I don't think I have seen Mr. Morgan again personally until I ran into him here in the hall after this trial had commenced from the time he was in my office and negotiated the contract.

Q. And when was it that you and Mr. Agostino had this parting of the ways, as you have described, was that in August?

A. I think I answered that question by saying that it was probably the second week or close thereto in August.

Q. Say, when you were down there at that place, Mr. Butcher— [421]           A. What place?

Q. At the Barry Arm Camp, did you see Lambert down there?

(Testimony of Harold J. Butcher.)

A. I saw a man known as Blacky, if his last name was Lambert that was the man.

Q. What was he doing there?

A. He had a crew of men there, I believe logging at this camp. When we went up to the camp, Mr. Agostino and I, we didn't enter the camp we just stood on the outskirts and watched the men and then turned and left and as we started to leave two fellows who, I believe, were workmen, came across the creek. One of them had a rifle and they were heading down toward the beach and Mr. Agostino spoke to them and I believe he asked them where Mr. Lambert was and they said he was off somewhere. And as we walked down this half-mile road toward the beach suddenly Mr. Lambert came from—my recollection it was a road going up a hill at the side—and Mr. Lambert came from that direction and Mr. Agostino spoke to him quite congenially and they spoke as two friends. There was no differences that I could detect and he introduced me to him, calling him Blacky, and I am impressed with the man as a result of that name of Blacky rather than any other name.

Q. Mr. Butcher, did you see the bunkhouse and cookhouse at—that Bruno showed you there that was his old place?

A. If that is the rather large building, contrasting it with the other two sheds in which the tractors were which was towards [422] the glacier. I had no sense of direction there but I recall Mr.

(Testimony of Harold J. Butcher.)

Agostino pointing out a glacier further down from this larger building, if that is the building you mean, yes, I entered that building with Mr. Agostino and went upstairs where there was, I believe, some beds and mattresses.

Q. What kind of a place was that?

A. It wasn't a bad place.

Q. It was rather nice, wasn't it?

A. It was my impression it was rather nice. I wouldn't have minded stopping there.

Q. And, now, about the caterpillars, did you see them, they were just sitting in the sheds I believe at the time?

A. They were sitting in the sheds and we entered the sheds or the leanto. I don't remember any doors, but I do remember the buildings they were in and it could have been a leanto.

Q. You were not with him but the one trip, were you, Mr. Butcher?

A. I only made one trip down there.

Q. And Mr. Agostino had a Kodak and at least part of the pictures you snapped yourself, did you?

A. I am certain that I snapped all the pictures. Mr. Agostino is, for a gentleman his age, an extremely active man and he climbed those steep hills almost like a billy goat and I found myself fagged out tagging behind him. I carried the Kodak, which was about all I was capable of carrying then and I know that I [423] snapped all the pictures.

Q. That was with his Kodak?



(Testimony of Harold J. Butcher.)

A. With his Kodak.

Q. You didn't go back there with him in September?      A. No, I didn't.

Mr. Bell: I think that is all.

The Court: Any redirect examination?

Mr. Boochever: I believe there was one question, Your Honor. No further questions.

The Court: That is all, Mr. Butcher.

(Witness excused.)

The Court: Another witness may be called.

VENETIA HAHN

By Mr. Boochever:

Q. What is your name, please?

A. Venetia Hahn.

Q. And what is your occupation?

A. Deputy Clerk of the Court.

Q. And as such do you have custody of the records of the Court?      A. Yes, I do.

Q. Do you have a case entitled No. A-5196?

A. Yes, I do.

Q. What is the title of that case?

A. Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, plaintiffs, [424] versus Ella-mar Packing Company, Inc., a corporation, defendant.

Q. Is that case pending at the present time?

Mr. Bell: We will admit that it is and save time.

(Testimony of Venetia Hahn.)

The Witness: Yes, it is.

Mr. Boochever: Very well.

Q. Will you read paragraph 3(a) of the complaint of that case?

Mr. Bell: I object to any part of it unless it is all put in. I am perfectly willing that any particular document in there be put in of the whole thing but not any one sentence out of it.

Mr. Boochever: I am not trying to get one sentence, what I am trying to get in is that it concerns a certain caterpillar.

Mr. Bell: Why don't you put in the complaint?

Mr. Boochever: We are willing to have it——

The Court: I think there are several complaints, do you want the——

Mr. Boochever: I want the third amended complaint.

The Court: Without objection the third amended complaint will be received and appropriately marked.

Mr. Bell: No objection.

The Court: I presume that copy can be substituted?

Mr. Boochever: We can have it typed up, if necessary, but if counsel——

Mr. Bell: We have no objections to any method, Your Honor wants to handle it. If I had a copy I would sure give it to him.

Mr. Davis: If we may take the file home this evening we [425] will have a copy ready.

(Testimony of Venetia Hahn.)

The Court: I think the Clerk may desist from marking the file as an exhibit because that case is still pending, as I understand, and it will be understood that that complaint—the third amended complaint—or a certified copy thereof will go in as Defendant's Exhibit K, I presume.

Mr. Bell: That is perfectly acceptable to us.

The Court: And it may be read to the Jury at some appropriate time. Will counsel stipulate that it may be read to the jury without keeping the witness on the stand?

Mr. Bell: Oh, yes, sir.

Mr. Boochever: Very well.

Mr. Ross: And I do have an extra copy and I will save them the trouble of writing it over.

The Court: Very courteous of you.

Mr. Boochever: Your Honor, I wanted particularly to get the prayer of that complaint read.

The Court: You may read the prayer now if you want to and the whole thing can be read to the jury by either of counsel at any time and the exhibit will go to the jury, of course, with the other exhibits.

The Clerk: Very well, Your Honor.

Mr. Boochever: Here is the prayer of this complaint: "Wherefore, plaintiffs pray for a decree of this Court adjudging [426] that the plaintiffs have fully paid for the caterpillar tractor and equipment above described and that there is no balance due thereon to the defendant, Ellamar Packing Company, Inc., and that the title to said

(Testimony of Venetia Hahn.)

tractor and equipment above-described is in the plaintiffs, free and clear, of any and all liabilities to the defendant and for all costs and disbursements herein, including reasonable attorneys fees, and for such other and further relief as the Court may deem equitable and just in the premises, and for general relief.”

“Herman H. Ross, and Bailey E. Bell, Attorneys for Plaintiffs.”

“United States of America,

“Territory of Alaska—ss.

“Stanley Socha, being first duly sworn, upon oath deposes and says: That he is one of the plaintiffs in this action; that he has read the foregoing Third Amended Complaint, and knows the contents thereof, and that the same is true as he verily believes.”

“(Signed) Stanley Socha. Stanley Socha.”

“Subscribed and sworn to before me this 11th day of May, 1949. (Signed) Bailey E. Bell, Notary Public in and for the Territory of Alaska.”

Mr. Ross: Later on, Your Honor, we want to read the entire complaint.

The Court: Yes, it may all be read. I think there is some provision of the Code which says the exhibit must be read before [427] the witness leaves the stand, but there is no point in keeping the witness on the stand.

Q. (By Mr. Boochever): Now, do you have the case there, No. A-4644? A. Yes.

(Testimony of Venetia Hahn.)

Q. What is the title?

A. Bruno Agostino versus Raymond Grasser, defendant.

Q. And is that case still pending at this time?

A. Yes, it is.

Q. Now, has any answer and cross complaint been filed in that case?

A. It was filed May 13, 1949.

Q. Has any reply been filed to the answer and counter claim? A. No, there hasn't.

Mr. Bell: I didn't understand the date?

The Witness: The answer and cross complaint was filed May 13, 1949.

Mr. Bell: Who was that filed by?

The Witness: That was filed by Davis & Renfrew, Attorneys for defendant.

Mr. Boochever: We would like just part of that to be read, Your Honor.

Mr. Bell: We object to the answer and cross complaint of Mr. Davis' in another case unless he wants to introduce the whole record. [428]

Mr. Davis: Your Honor, the time for replying has long expired on that and it is five days under the rule of the Court and any affirmative allegations are deemed admitted by the plaintiffs in the case.

Mr. Bell: Mr. Ross and I are not attorneys in the case in any way so we would not be bound by it.

The Court: It is true that there is a five-day rule for requiring that replies be filed to answer in cross complaint but that matter is to some extent

(Testimony of Venetia Hahn.)

under the control of the Court and a reply may conceivably be filed after the time provided by rule has expired. What is the offer, Mr. Boochever?

Mr. Boochever: Your Honor, I imagine that should be made in the absence of the jury, shouldn't it?

The Court: Well, it is five o'clock now.

Mr. Bell: I don't think that it is competent for any purpose. Mr. Ross and I are not attorneys. Mr. Hellenthal, I think, is the attorney in the case.

The Court: If counsel for the defendant thinks that the failure to file reply can go to the jury as an admission of the averments of the counterclaim I must advise him that the Court will not instruct the jury in that fashion at all. It will be just a claim and not an admission by the plaintiff Agostino in that case, if anything.

Mr. Boochever: May the answer and counterclaim come into evidence, then, Your Honor? [429]

Mr. Bell: No, I object to it, Your Honor, it is not competent. It is incompetent for any purpose: it is irrelevant.

The Court: Objection is sustained.

Mr. Boochever: Very well, Your Honor, no further questions.

#### Cross-Examination

By Mr. Bell:

Q. What date was that suit originally filed?

A. August 6, 1947.



(Testimony of Venetia Hahn.)

Q. August 6, 1947, and it is still pending, isn't it?

A. Still pending.

Q. What date was this other suit against the Ellamar Packing Company filed? What date was the suit first filed? I guess you could tell by the summons, probably.

A. September 22, 1948.

Q. September 22, 1948. Thank you, that is all.

Mr. Boochever: Your Honor, in regard to this second suit here which we ruled out on the answer in counter claim, I would like to ask one more question, if I may. This is subject to objection of counsel, too, so don't answer until they have had an opportunity to object.

#### Redirect Examination

By Mr. Boochever:

Q. Do you know what the subject matter or can you determine what the subject matter of that suit it?

A. Well—— [430]

Mr. Bell: I object to that for the reason that is incompetent, irrelevant and immaterial.

Mr. Boochever: I ask to offer the complaint in evidence, then, Your Honor, at this time. Do you have any objection to that, counsel?

Mr. Bell: The complaint?

Mr. Boochever: Yes.

Mr. Bell: No.

Mr. Ross: We object to taking up the time of the Court and the Jury in offering the complaint.

The Court: The complaint may be admitted in

(Testimony of Venetia Hahn.)

evidence without objection as Plaintiff's Exhibit L and may be read to the Jury in the absence of the witness without objection.

Mr. Boochever: No further questions.

The Court: This is the complaint in A-5196, Agostino versus Ellamar? In that case, too, perhaps—well, maybe there is no avoiding marking it as an exhibit.

Mr. Davis: Your Honor, if I may borrow the file I will make a copy of it so that it can be compared and then——

The Court: Very well, we will do that. Let Mr. Davis borrow the file and a copy will be substituted. Both of these complaints may be read to the jury later.

It is now five o'clock and evidently we will not be able to finish the case today, so the trial will be continued until next Monday morning at ten o'clock. Ladies and Gentlemen, you [431] will remember the law that you should not discuss the case among yourselves or with others or listen to any conversation about it or form or express an opinion until it is finally submitted to you.

The Jury will retire and report Monday morning at ten o'clock.

Court now stands adjourned until next Monday morning at ten o'clock.

(Whereupon, at 5:15 p.m., Friday, June 3rd, 1949, the case was recessed until 10 o'clock, a.m., Monday, June 6, 1949.) [432]

Monday, June 6, 1949

(Whereupon, at 10:00 a.m., the above-entitled matter came on for taking of testimony.)

The Court: The Clerk will call the roll of the jurors in the box.

(Jurors names were called by the Clerk and answered to.)

The Clerk: They are all present, Your Honor.

The Court: Another witness may be called on behalf of the defendant.

EDWARD F. MEDLEY

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

A. What is your name?

A. Edward F. Medley.

Q. What is your occupation, Mr. Medley?

A. Attorney.

Q. And are you licensed to practice law in the Territory of Alaska?      A. I didn't hear that?

Q. Are you licensed to practice law in the Territory of Alaska?      A. Yes, sir.

Q. And are you in the State of Washington?

A. That is where I practice mostly—in the State of Washington.

Q. Judge Medley, in your capacity as attorney has a suit [435] brought by Mr. Agostino and Mr.

(Testimony of Edward F. Medley.)

Socha against the Ellamar Packing Company come to your attention?      A. It has.

Q. Involving a tractor?

A. Involving a tractor.

Q. Have you ever had occasion to give instructions to the Ellamar Packing Company in regard to that tractor?      A. I have.

Q. What instructions did you give them?

Mr. Bell: I object to that because that would not be binding on these people.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, in the first place we would have to know in regard to our motion in regard to the reply that point would be of considerable relevance here.

The Court: Motion is denied.

Mr. Boochever: The motion is denied in its entirety, is that correct, Your Honor?

The Court: Yes.

Mr. Boochever: Then certainly it is relevant for us to show the relevance of the tractor.

The Court: Not the instructions.

Q. (By Mr. Boochever): Do you know whether the Ellamar Packing Company repossessed that tractor? [436]

Mr. Bell: I object to that. It wouldn't be binding here under the terms of the suit.

The Court: Overruled, tell what happened.

The Witness: Yes, sir, it did.

(Testimony of Edward F. Medley.)

Q. (By Mr. Boochever): Do you know why they repossessed it?

Mr. Bell: Object to that. That is a conclusion.

The Court: A proper answer is possible under the question.

Mr. Bell: I object to it on the further grounds that it is incompetent, irrelevant and immaterial and not within the issues set forth in the pleadings and no proper foundation has been laid.

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. Well, the tractor was originally sold on a conditional sale contract, which was delinquent. We asserted our rights under the conditional sales contract and repossessed it.

Q. Do you know whether the repossession was done because of the request or anything of that nature of Columbia Lumber Company?

Mr. Bell: Object to that for the reason it would not be competent. He is an attorney down in Seattle.

The Court: He can speak so far as he knows.

The Witness: The request was done on my advice and instruction. The repossession was done on my advice and instructions without any connection with the Columbia Lumber Company as far [437] as I am concerned.

Mr. Boochever: No further questions, Your Honor.

(Testimony of Edward F. Medley.)

The Court: Counsel for plaintiff may examine.

Cross-Examination

By Mr. Bell:

Q. Mr. Medley, as to whether or not that contract of sale was a conditional sales contract, that is your opinion that it is a conditional sales contract, isn't it? A. That is right.

Q. And there is a controversy now in Court over that, whether or not it was a conditional sales contract or a straight sale, isn't there?

A. Well, I wouldn't interpret that controversy quite like that, Mr. Bell.

Q. Well, the question of whether or not it is a conditional sales contract that you have told the jury that it was, it is just your opinion that it is, isn't it?

A. Well, to answer that, I would say this, that the contract speaks for itself and I haven't got it before me. But we acted and proceeded and took possession under it as if it were a conditional sales contract.

Q. Mr. Medley, do you know—did you know or were you advised of the fact before you directed your company to take possession of that tractor that Mr. Brown had agreed with Mr. Agostino to call it square for the tractor and not sue each other about it [438] more than two years before that?

A. The only way I can answer that, Mr. Bell, is that Mr. Brown says he had no such agreement with Mr. Agostino.



(Testimony of Edward F. Medley.)

Q. But, now, if they did have such an agreement you would not have advised them to—if Mr. Brown had told you he had that agreement you would not have advised them to take the tractor, would you?

Mr. Boochever: Object to that; it is pure conjecture.

The Court: Objection is sustained.

Mr. Bell: Exception.

Q. You do know as a lawyer if that agreement did take place it would be binding, wouldn't it?

A. Please repeat that.

Q. If there was a controversy between Agostino claiming he had paid \$16,000 in money and timber for that tractor and Mr. Brown was still claiming more and claiming he had not paid that amount and they were in a quarrel about it and then they did agree to each refrain from suing the other and had been threatening to sue each other up to that time, you will admit that that would be a binding agreement if Mr. Brown, Vice President of the Ellamar Packing Company, in charge, did make that agreement, wouldn't you?

Mr. Boochever: Object to that question as pure conjecture, same objection.

The Court: Objection is sustained. [439]

Mr. Bell: Exception. We want to make an offer of proof, then, Your Honor.

The Court: The jury will retire to the jury room.

Mr. Bell: We offer to prove by this witness, if he were permitted to answer, that question, that he

(Testimony of Edward F. Medley.)

would admit that if that kind of an agreement had been made and he had known about it he would not have advised attempting to take the tractor because the contract would have been binding and that his action in taking it or directing his company to retake it was not based upon the theory that Mr. Brown had made such understanding but was made without his knowledge of such an agreement.

Mr. Boochever: Well, of course, that is obviously calling for a conclusion of law from the witness and there is no testimony at all in regard to such an agreement having been made. The testimony is to the contrary.

Mr. Bell: Your Honor, I call attention before you ruled on the statement of counsel that the whole thing is merely an opinion of the witness—everything he has testified to—outside of the fact that he has been and is attorney for the Ellamar Packing Company and that no part of it is our contention should have been admitted but since it has been admitted over the objections of the defendants then we have the right to cross-examine on that line.

The Court: The objection is sustained and the offer to prove excluded. [440]

Mr. Bell: Exception, please.

Mr. Boochever: Your Honor, at this time we might also mention outside the present of the jury that in the copy of the complaint which was introduced into evidence yesterday in that Ellamar Packing Company case, the copy prepared does not

(Testimony of Edward F. Medley.)

include a copy of the conditional sales contract made a part of the complaint and we meant that to be included quite naturally in the evidence when the complaint is introduced.

Mr. Bell: I will agree that copy that is attached to the other complaints ahead may be substituted and even detached and attached to this instrument.

Mr. Boochever: That is perfectly satisfactory, your Honor.

Mr. Bell: And we will notify the Court in advance that we will ask an instruction as to whether or not that was a conditional sales contract or a straight out and out sale, and we would like to have a copy of it before the Court as soon as we could and we will try and get that done right away, because we contend that it was an out and out sale and not a conditional sales contract at all.

The Court: As I understand, then, you have stipulated that a copy of the contract, whether it was a conditional sales contract or not, may be attached to the complaint or to the amended complaint in the suit of Agostino against the Ellamar Packing Company which goes to the jury?

Mr. Bell: That is right. [441]

Mr. Boochever: That is right.

Mr. Bell: But with the understanding that Your Honor will instruct one way or the other as to whether it is or is not a conditional sales—

Mr. Boochever: I object to that understanding.

The Court: It can't be—no, if that is a part

(Testimony of Edward F. Medley.)

of the stipulation it shouldn't be entered because I could make no commitment to instruct on that point at all. We are not trying the Ellamar Packing suit. I wouldn't be prepared to pass upon it until I hear all the evidence of the suit. I could not pass upon it upon this brief fragmentary evidence. From what I understand from my inadequate recollection of it, one of the vital issues to be decided upon the suit is that in the *Agostino versus Ellamar Packing Company*.

Mr. Bell: That is correct, but the instrument itself will determine whether or not it is.

The Court: As far as I can see, Mr. Bell, I will not be justified at all in passing upon the legal——

Mr. Bell: Well, think it over and we will ask an instruction.

The Court: But your stipulation still stands that a copy of it may go to the jury—a copy of the complaint of *Agostino versus Ellamar Packing Company*?

Mr. Bell: We will stipulate it can be attached to the complaint because it should have been attached. On that theory [442] it should have been attached and if it isn't, why, we intended to attach it and we will attach one to the end.

The Court: Any further cross-examination.

Q. (By Mr. Bell): Mr. Medley, have you represented Mr. Morgan in other litigation?

A. Do I represent Mr. Morgan?

Q. Yes.           A. No, sir.

(Testimony of Edward F. Medley.)

Q. Have you represented the Columbia Lumber Company?           A. No, sir.

Q. And you live in Seattle, do you?

A. Yes, sir.

Q. And did you volunteer your testimony here in this case?

A. No, sir, I am up here on other business and Mr. Boochever spoke to me about the case yesterday.

Q. You haven't been subpoenaed, have you?

A. No, sir.

Q. I mean you are a volunteer witness here at this time?

A. I am here as a courtesy to Mr. Boochever.

Q. As a what?

A. As a—I came here as a courtesy to Mr. Boochever.

Q. That is one of the attorneys for the defendant?           A. Yes, sir.

Mr. Bell: That is all. [443]

The Court: That is all.

Mr. Boochever: That is all.

The Court: Another witness may be called.

### GEORGE B. SCMIDT

called as a witness herein, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Boochever:

Q. What is your name?

(Testimony of George B. Schmidt.)

A. George B. Schmidt.

Q. What is your occupation, Mr. Schmidt?

A. I am assistant to the Manager of the Columbia Lumber Company.

Q. Calling your attention to July of 1948, what was your occupation then?

A. The same—Assistant to the Manager—to the President.

Q. Did you in that capacity ever have occasion to sign any checks made payable to the Clerk of the Court or to Bruno Agostino?

A. Yes, sir, I did.

Q. I show you Defendant's Exhibits H, I and J and ask you if you can identify them?

A. Yes, I can.

Q. What are they?

A. They were checks tendered in payment of equipment that we [444] were to buy from Bruno Agostino.

Q. Do you know when those checks were signed?

A. Approximately sometime between July 10th—well, it was about July 10th was about the day they were signed, about then.

Q. Do you recognize the signatures that were on those checks?      A. I do.

Q. Whose signatures are they?

A. Thomas Morgan, the President, and my own.

Mr. Boochever: At this time we would like to offer these checks into evidence as Defendant's Exhibits H, I and J.



(Testimony of George B. Schmidt.)

Mr. Bell: Object to them, they are incompetent, irrelevant, not within the issue and no proper foundation laid.

The Court: Objections are overruled and they may be admitted and marked as Defendant's Exhibits H, I and J.

Q. (By Mr. Boochever): Mr. Schmidt, after the signing of those checks did you have any further connection with them?

A. Yes, I took the checks up to Mr. McCarrey's office and he was representing the Columbia Lumber Company in this transaction and I gave them to him sometime around between the 10th and the 15th or the 20th of July.

Q. And did you give Mr. McCarrey any instructions as to what to do with those checks as the attorney for the Columbia Lumber Company?

Mr. Bell: I object to that—a communication between an [445] attorney and client would not be binding upon our clients unless they were present and heard it or knew about it.

The Court: Overruled.

Mr. Bell: Exception.

The Witness: I gave the checks to Mr. McCarrey and told him that they were to be used in the purchase of this equipment when and if the contract was fulfilled.

Mr. Bell: Now, Your Honor, I move to strike the second part of the answer where he said he told Mr. McCarrey to give them to or to use them or

(Testimony of George B. Schmidt.)

give them to Mr. Agostino if the purchase went through, because that is purely a conversation.

The Court: Motion is denied; exception will be noted.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Now, did you state anything in regard to what you meant by "if the contract went through"?

A. Well, there were conditions which were to be fulfilled and if they were fulfilled then the contract would be valid.

Q. Do you know what the conditions were?

Mr. Bell: Object to that as being incompetent, irrelevant and immaterial what he knew about it.

The Court: Did you participate in any of the conversations between Agostino and Mr. Morgan?

The Witness: Did I? No, no, sir.

The Court: All you know about it is what Mr. Morgan told [446] you?

The Witness: That is right.

The Court: Objection is sustained—hearsay testimony.

Q. (By Mr. Boochever): Mr. Schmidt, in giving your instructions to Mr. McCarrey, did you tell him on what conditions to turn over the checks?

Mr. Bell: I object to that as purely a hearsay, a self-serving declaration, incompetent, irrelevant, immaterial, not within the issues of the case and for the further reason no foundation has been laid.

The Court: Objection is overruled.

(Testimony of George B. Semidt.)

The Witness: Repeat your question, please.

Mr. Boochever: Read the question.

(Question read.)

The Witness: Yes, I told him.

Mr. Bell: I object to that, he has answered the question.

The Court: Overruled.

Mr. Bell: Exception.

The Witness: Yes, I told him that we had to follow the conditions outlined in the contract and if they were not complied with, why, then, they were not to be surrendered.

Mr. Bell: Now, I move to strike the answer as not responsive to the question—the question was “Did you tell him something”?

The Court: Motion is denied. [447]

Mr. Boochever: No further questions.

The Court: Counsel for plaintiff may examine.

#### Cross-Examination

By Mr. Bell:

Q. Did you sign the checks—do you sign the ordinary checks at the Columbia Lumber Company?

A. Yes, I have that privilege.

Q. What kind of a check book did you use for issuing those—I mean for issuing any checks that you write over there?

A. We usually have a regular check—the regular form.

Q. And is it numbered?

A. Well, usually the checks are numbered. In

(Testimony of George B. Schmidt.)

this particular case they were not for the reason we issued them in the office here at Anchorage and they usually come from Juneau where we do have the regular sequence of checks. In this case there was time when we didn't have it to do so we did it here.

Q. Do you pay bills to your employees and other people here in Anchorage with checks that you sign?

A. Yes, I can do that, too, but we carry two different accounts here—we carry a general account and we carry a revolving account for the yards and on each of those I have the authority to sign.

Q. Now, do you use numbers on those checks, now?

A. Yes, that is right.

Q. You have used numbers for that purpose all the way through, [448] I believe you stated?

A. We do, yes, there are exceptions, though.

Q. Now these checks are made on just a plain check—Columbia Lumber Company name doesn't appear on it only on a typewriter down at the bottom, does it?

A. That is right.

Q. That is what we would use if we just walked in the bank—what is called a counter check at the bank?

A. That is right.

Q. Now the checks that you pay bills with here in town, the Columbia Lumber Company name is printed on them, isn't it?

A. That is right.

Q. Now, when did you start using printed checks for the payment of bills here?

A. We always have used printed checks.

Q. You have always used them?

(Testimony of George B. Schmidt.)

A. That is right.

Q. Are you sure that you talked to Mr. McCarrey when you went up to his office?

A. Certainly I talked to Mr. McCarrey.

Q. Do you know about what time that was?

A. Sometime between the 10th and probably the 15th or 20th of the month. I don't recall the exact date but I do know it was along about that time. I had been in Juneau along about the 4th of July and I got back here about the 7th or the 8th and it [449] was after I returned.

Q. Do you know why those checks are dated different dates?

A. They are dated different dates—they were to be paid on those particular dates on which they were dated.

Q. And you don't know why that Bruno Agostino has never seen those checks up to this time, do you?      A. No.

Q. Do you have any idea—can you tell the jury any idea why they weren't delivered to Mr. Agostino or to his attorney?

A. Well, I don't know that, only by hearsay.

Q. Then one was payable to the Court Clerk for \$3,300.00, isn't it?      A. Yes, that is right.

Q. And that was never delivered to the Court Clerk, was it?

A. I don't know that, couldn't tell you.

Q. It doesn't show cash through any bank, does it?      A. No, it doesn't.

(Testimony of George B. Schmidt.)

Q. It never has been cleared through the bank and charged to the Columbia Lumber Company account? A. Not that I know of.

Q. Did you ever stop payment on them?

A. No, sir.

Q. And you didn't know where they went to until now?

A. Well, no, I don't know, I couldn't tell you where they were held. I knew where they were held but I didn't see them. [450]

Q. Did you intend that your attorney, Mr. McCarrey, should give them to Bruno Agostino?

A. No, we intended to give them to his attorney after this thing was settled.

Q. After it was settled?

A. After the terms of the contract were consummated.

Q. What more was to be done by the terms of the contract? A. Well, as I understood it—

Q. No, not what you understood; what did you know about it was to be done?

A. Just telling you he had to abide by the conditions that were stated in the contract and that was Mr. McCarrey's lookout not mine.

Q. And then that so far as you know had been done before the contract was signed, had it not?

A. No, it hadn't been. That is, I was told it hadn't been.

Q. You saw the contract, didn't you?

A. Yes.



(Testimony of George B. Semidt.)

Q. And the contract was that \$3,300.00 was to immediately be deposited with the Clerk of the Court?

A. Providing he was willing to go through with the contract as stated. Well, apparently, it wasn't done.

Q. He had signed it all right and turned it over to your Manager or President of the Columbia Lumber Company, hadn't he?

A. I don't know that. [451]

Q. Well, haven't you ever seen the contract?

A. Yes, but I don't know, I didn't see it after it was signed.

Q. You saw it after Agostino signed it, didn't you?

A. No, before it was signed I read the contract.

Q. Where did you read that?

A. Well, I don't recall where I read it. I know I read it. I knew the conditions of it.

Q. About what date was that that you read it?

A. I couldn't tell you that, I don't remember.

Q. Couldn't you tell us whether it was spring, summer or fall or what time?

A. No, I can't recall off-hand.

Q. Where did you read it; where were you when you read it?

A. I don't remember whether it was Juneau or whether it was here, I know I read it, that is all.

Q. And it had never been signed by Agostino?

A. It wasn't at the time I saw it, no.

(Testimony of George B. Schmidt.)

Q. Are you sure you didn't read it over in Mr. Butcher's office?      A. No.

Q. You are positive of that?      A. No.

Q. I hand you a paper that has been marked Identification No. 35, I will ask you to state if you have ever seen that or a similar one? [452]

A. Yes, these are payroll—these look like payroll checks. That is, they are identical to a payroll check.

Q. I will ask you to examine 36 and see if it indicates the same thing?      A. That is right.

Q. Now do you notice a number on these—on each of those?

A. No, there is no number on that section of it. The number goes on the check proper, this is just an adenda to the check.

Q. Mr. Schmidt, the check then that this was attached to had the number on it?

A. That is right.

Q. Are they made out to bend back to be double?

A. That is right.

Q. You don't use a book for those, they are just printed, are they?      A. With the checks?

Q. Yes.      A. Yes, they are just printed.

Q. And that is what you call a voucher?

A. A voucher. We have a duplicate of that sheet.

Q. Do you have the duplicate of these other checks that you examined there?      A. No.

Q. Can you tell the jury why you didn't use the

(Testimony of George B. Schmidt.)

same kind of checks to give to Mr. McCarrey that you used on these others? [453]

A. Yes, I can tell you very easily. Those checks were made here in Juneau—Anchorage and the General Account checks are only held in Juneau and we made those up when we were here in Anchorage in order to present these to give them to Mr. McCarrey to present to Mr. Agostino or his attorney.

Q. Well, they are made out on the Bank of Alaska right here in Anchorage, aren't they?

A. On the General Fund.

Q. But they are made on the Bank of Alaska, aren't they?      A. That is right.

Q. And you say you used them away back when Blacky Helmer was working for you—those duplicate forms then?

A. Yes, but that is again on a revolving fund, Whittier. We have a revolving fund for every bank which is independent from entirely from the General Fund account which is controlled at Juneau and these checks that were issued were issued on a General Fund at Juneau over which the various branches have no control whatever and they don't issue any checks on it. It is only Juneau or the authorities that have the authority to sign on the Juneau General Fund that can sign those General Fund checks.

Q. Does Mr. Morgan have authority to sign them?

(Testimony of George B. Semidt.)

A. Why, certainly, he has authority to sign those.

Q. He signed those Bank of Alaska counter checks that you have seen, didn't he?

A. That is right. [454]

Q. You don't know why Mr. Morgan didn't use the regular form check for that, do you?

A. We didn't have any here and we had to do it here.

Q. And you didn't have any number on these?

A. That is right.

Q. Did you ever make a number or give them a number?

A. I don't know if the Juneau office did but they were notified of the issuance of those checks, as I recall it.

Q. As you recall it?           A. Yes.

Mr. Bell: I think that is all.

The Court: That is all.

Mr. Boochever: I have one other question of the witness, Your Honor.

#### Redirect Examination

By Mr. Boochever:

Q. Mr. Semidt, I show you a copy of a sales agreement and ask you if it was an unsigned copy like this that you refer to——

Mr. Bell: I object to it as leading and suggestive.

The Court: Yes, the objection is sustained, telling the witness what answer to make.

(Testimony of George B. Semidt.)

Mr. Boochever: I am sorry, Your Honor, I had no intention of doing that, if I did.

Q. Mr. Semidt, you referred to Mr. Bell about seeing an unsigned copy of an agreement— [455]

A. That is right.

Q. —I ask you to look over this copy of an agreement to see if it is similar or like the one you saw? A. Yes, it is.

Mr. Boochever: I think I should have this marked for identification here.

The Court: It may be so marked.

The Clerk: Defendant's Exhibit M for identification.

The Court: Defendant's Exhibit M for identification.

Q. (By Mr. Boochever): Now, on the last page of this copy I would like you to look at that and ask you if that is similar to the copy you saw?

Mr. Bell: Object to that as leading and suggestive, incompetent, irrelevant and not proper redirect and it is not based upon any of the pleadings in the case and no proper foundation laid.

The Court: Well, it is leading but it may stand.

The Witness: Well, the only thing is I didn't see the signature of Bruno Agostino on it originally. It was simply blank as I recall, nor was it signed by Mr. Morgan.

Mr. Boochever: No further questions, Your Honor.

(Testimony of George B. Schmidt.)

Recross-Examination

By Mr. Bell:

Q. Mr. Schmidt, do you know where that pink copy came from?

A. Haven't the least idea, no. [456]

Q. You never did see that one before?

A. No, sir.

Q. Was it a short copy like that?

A. No, legal.

Q. It was legal that you saw?

A. That is right. I was looking there at the money involved.

Q. The copy you saw was on legal paper, wasn't it?

A. Yes, something like that.

Q. You don't have any idea who made up that pink one there?

A. Absolutely not.

Q. And that pink one couldn't be made at the same time at the typewriter as this one, could it, because the contract itself is longer than this, about two or three inches, isn't it?

A. Your guess is as good as mine, I don't suppose so.

Q. You can tell by comparing these?

A. Also you can too.

Mr. Boochever: I object to the question, it speaks for itself.

The Witness: I would say no.

The Court: It hasn't been offered in evidence.

Q. (By Mr. Bell): It couldn't be made at the same stroke of the typewriter, could it?



(Testimony of George B. Schmidt.)

A. No.

Q. And you don't know where this came from?

A. No.

Q. I call your attention, Mr. Schmidt, this typewritten copy that you see has the signatures typed in, doesn't it?

A. That's is right, I said I didn't see any signatures. I testified I didn't see any signatures on the copy I seen.

Q. Then it couldn't have been this one you saw, could it?

A. No, the context was probably the same but as far as the money value was concerned, that is.

Q. But the copy you saw was on legal paper?

A. That is right.

Mr. Bell: That is all.

Mr. Boochever: No further questions.

The Court: That is all. Another witness may be called.

Mr. Boochever: Your Honor, this next witness I see is in the court room here. I don't believe that he is about to testify to anything that was testified to while he was here, in fact I know it isn't, it is on an entirely different point.

The Court: Very well, he may come forward.

Mr. Bell: Your Honor, before this witness testifies, since he has been called from the floor of the court room and the rule has been required by the defendants, I must object to him testifying at all

unless I am given some right to first ask some preliminary questions.

The Court: You may ask him.

### WINFIELD ERVIN

called as a witness herein, being first duly sworn, testified as follows:

Mr. Bell: Where do you live?

The Witness: Anchorage, Alaska.

Mr. Bell: When did you first hear any part of the trial in this case?

The Witness: This morning.

Mr. Bell: And you have been in the court room since the time we started this morning?

The Witness: About 25 minutes after ten.

Mr. Bell: You were here when we started putting on evidence?

The Witness: I was here. You were just finishing with Mr. Medley.

Mr. Bell: And you have been here ever since?

The Witness: That is right.

Mr. Bell: And in the court room?

The Witness: That is right.

Mr. Bell: I object to the witness testifying.

Mr. Boochever: The witness will be asked nothing in regard to any of the matters which the witness, Mr. Schmidt, testified or the witness, Mr. Medley, testified.

The Court: Was the witness warned to stay out of the court room?

Mr. Boochever: No, Your Honor, I don't be-

(Testimony of Winfield Ervin.)

lieve I warned [459] this witness to stay out of the court room. I did not think he would come in.

The Court: Objection overruled.

Direct Examination

By Mr. Boochever:

Q. What is your name?

A. Winfield Ervin.

Q. What is your occupation, Mr. Ervin?

A. Manager of the Caterpillar Branch of the Northern Commercial Company, 3rd District.

Q. For how long have you been so occupied?

A. Since 1937.

Q. Are you familiar with the various models of caterpillar tractors? A. Yes, sir.

Q. Are you familiar with their values?

A. In a vague way.

Q. That is your business handling them and selling them? A. That is right.

Q. Now, approximately how old would a caterpillar tractor, model RD-7, No. 9G4602 be?

A. Well, I would say over eight years old.

Q. And how about a model RD-8, No. 1H2364?

A. Over eight years old.

Q. And now what is the normal life as far as a depreciation [460] schedule is concerned of a caterpillar tractor used in a logging operation?

Mr. Bell: I object to it unless he testifies that he knows or is qualified along that line. He might understand caterpillars well but not know the length of life of a caterpillar in a logging operation.

(Testimony of Winfield Ervin.)

The Court: Objection is sustained.

Q. (By Mr. Boochever): Are you familiar with the depreciation schedules that are usually set up for caterpillar tractors used in logging operations?

Mr. Bell: I object to that, it wouldn't be controlling in this case.

The Court: It may throw some light on it.

Mr. Bell: I object further on the theory that it is not within the pleadings, no proper foundation laid, the witness is not shown to be qualified to testify on that particular subject and for the further reason it is incompetent, irrelevant, and immaterial.

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. Well, I believe it is customary for income tax purposes only to set up a depreciation schedule 4 to 5 years is allowable, as I understand, by the Internal Revenue. That doesn't necessarily [461] mean that the machine will be entirely worn out in that length of time.

Mr. Bell: Now, Your Honor, I move to strike the answer as not being responsive to the question for the further reason it is now made *it* by the answer has made itself.

The Court: Motion is granted. The answer shows that the testimony is valueless because the income tax people may have a formula all of their own which has no necessary bearing upon any—on any

(Testimony of Winfield Ervin.)

of the testimony that has been given here. Jury will disregard the answer.

Q. (By Mr. Boochever): Mr. Ervin, what would be the effect on a tractor of being immersed in salt water?

Mr. Bell: Object to that for the reason he has not yet qualified himself, that would take the chemist or someone else.

The Court: Not necessarily, but he hasn't qualified, at all. Objection is sustained.

Q. (By Mr. Boochever): Mr. Ervin, are you familiar with the repair work that is done on caterpillar tractors? A. I believe so.

Q. Have you had occasion to examine tractors that were immersed in salt water?

A. Not in salt water; I have seen them immersed in mud and water. [462]

Q. And do you know what the effect would be on a caterpillar of being immersed in salt water?

Mr. Bell: Your Honor, I object to it for the reason he says he has never had any experience with one immersed in salt water.

The Court: He has asked for his knowledge.

The Witness: I believe it would be more detrimental than it would be in fresh water.

Mr. Bell: I move to strike the answer for the reason it is not responsive to the question and for the further reason there is no proper foundation laid and also that the witness has not been qualified on that specific line.

(Testimony of Winfield Ervin.)

The Court: The motion is granted. Jury will disregard the answer.

Q. (By Mr. Boochever): Would you answer just whether you know just what the effect would be in general way of immersing a tractor in salt water?

A. Yes, I know what would be the results of it.

Q. And what would the results be?

A. Well, I know it would have to be taken all apart and cleaned up immediately otherwise you wouldn't have much left.

Q. Now, taking two caterpillar tractors of the age of the two that numbers were given to you and if it were required to put \$10,000.00 into those tractors to make them in a running condition so that they could be used in logging operations, [463] could you give any estimate of the value, from your knowledge of the going value of caterpillar tractors, of such tractors?

Mr. Bell: Now, I object to that for the reason it is incompetent, irrelevant, immaterial and not within the issues, no proper foundation laid, and especially there is no numbers proven and the dates of the sale of the tractors have not been proven and the tractor if setting in a dry place would not deteriorate at all. There is no showing as to the use of the tractor.

The Court: Objection is overruled.

Mr. Bell: Exception.



(Testimony of Winfield Ervin.)

Q. (By Mr. Boochever): Would you answer my question, please.

The Witness: Read the question.

(Question read.)

Mr. Bell: Your Honor, before he answers that may I state one further objection. This is a hypothetical question and is not based on all of the evidence that is before Your Honor and omits and does contain statements that are not in evidence before Your Honor, therefore, it is not proper.

The Court: You are asked whether or not you know what the value of the tractors are. Answer that question yes or no.

The Witness: No.

Q. (By Mr. Boochever): Would you know what the approximate value of tractors under the circumstances that I described there in March of 1948 would [464] have been?

Mr. Bell: I object to that for the same reasons above stated.

The Court: Overruled.

The Witness: No, I couldn't say without seeing the tractors.

Mr. Boochever: That is all.

#### Cross-Examination

By Mr. Bell:

Q. Mr. Ervin, tractors could be made eight years ago and not abused in operation and they would be in fair condition yet, wouldn't they?

(Testimony of Winfield Ervin.)

A. That depends on the number of hours of operation.

Q. You don't just junk it as long as it is usable, do you?      A. No.

Q. And you do trade in—do you take in used tractors on new ones at times?

A. Haven't had to yet; they are pretty scarce.

Q. They are still awfully scarce yet, are they?

A. Yes.

#### Redirect Examination

By Mr. Boochever:

Q. Would you take in a used tractor that had been immersed in salt water for a time?

A. No.

Mr. Boochever: That is all. [465]

Mr. Bell: Now, I object to that, of course. I didn't attack it in time but I thought he had stopped his questions and Mr. Ross was talking to me and I didn't attack it, but the question is evidently just a conclusion of the witness and incompetent, irrelevant and immaterial.

The Court: Motion is denied.

Mr. Bell: Exception.

#### Recross-Examination

By Mr. Bell:

Q. It wouldn't hurt a tractor any to be immersed in salt water if it was taken right out and washed out and cleaned, would it?

A. I don't believe so, not immediately.

Q. And if the tractor—

(Testimony of Winfield Ervin.)

Mr. Boochever: I don't believe the witness had completed his answer.

Q. (By Mr. Bell): Do you want to say some more at your answer?

A. I said if it was done immediately.

Q. What would you say immediately—a week?

A. No, right now.

Q. Right now? And what would happen to a tractor that was put in there, it was all oiled and greased as an ordinary tractor is and it was submerged and taken out and waited a week before it was cleaned, what would happen to it?

A. That depends on how long it was immersed.

Q. Say it was immersed a week, we will give it plenty of time, what would happen to it then?

A. Just the same as would happen to any other metal, it would be ruined in salt water.

Q. The grease protects the metal, doesn't it?

A. It will for a while but not very long.

Q. Boat hulls are run through the salt water for years—steel hulls—don't they? You know that, don't you?

A. They are all painted, aren't they?

Q. Well, tractors would be greased which would even be better for it, wouldn't it?

A. You don't know that it has been greased.

Q. Oh, well, you are just assuming that it was cleaned off perfectly clean and dry and was submerged in there, are you?      A. No, sir.

Q. Well, now, Mr. Ervin, if the tractor was

(Testimony of Winfield Ervin.)

taken out of the water and cleaned and was put back in use and used for a long period of time and operated normally, that wouldn't indicate that it was hurt any by this being submerged, would it?

A. Probably not.

Q. It would indicate that it wasn't hurt, wouldn't it?      A. Probably so.

Q. Yes, sir. That is all. Wait just a moment. Say, you do in your line of business take old caterpillars in and recondition them, don't you? [467]

A. I did once.

Q. Well, when you get it done, was it in good working order?

A. It seemed to be. The boys who bought it were satisfied.

Q. And, approximately, what did it cost you to recondition that thing?

A. Well, this was a small model tractor, the smallest one we make, the price on that you couldn't judge by every tractor.

Q. About what would it cost you to recondition that one? We will use that just as a yardstick.

Mr. Boochever: I object to that as being irrelevant and being of no value and improper redirect.

The Court: Objection sustained.

Mr. Bell: Exception.

The Witness: I don't remember.

Q. (By Mr. Bell): What would you charge to recondition an old RD-8 caterpillar?

A. Nobody could give you that answer.

(Testimony of Winfield Ervin.)

Q. Well, you wouldn't charge over \$5,000, would you, to recondition one?      A. Yes.

Q. You would? Did you ever do that to anybody?

A. I just got two out of the shop that cost—a smaller model than that—that cost \$7,500.00 to overhaul, and they weren't completely overhauled then. One of them was Mr. Morgan's and the other belonged to Lytle and Green. [468]

Q. This Mr. Morgan that you are testifying for now?      A. Yes, sir.

Q. Mr. Morgan is a friend of yours?

A. Surely.

Mr. Bell: That is all.

#### Further Redirect Examination

By Mr. Boochever:

Q. Is your testimony in any way influenced by the fact that Mr. Morgan is a friend of yours, Mr. Ervin?      A. Not whatsoever.

Mr. Boochever: That is all.

#### HERMAN H. ROSS

called as a witness herein, being first duly sworn, testified as follows:

#### Direct Examination

By Mr. Bell:

Q. State your name?

A. Herman H. Ross.

Q. Mr. Ross, after you were employed in the

(Testimony of Herman H. Ross.)

case did you have a conversation with Mr. McCarrey?

A. Yes, I had a conversation with Mr. McCarrey who was present in that conversation.

Mr. Boochever: Object to that as being incompetent, immaterial, improper cross, not being—

The Court: It is not cross-examination at all. Do you wish [469] to make the witness your witness?

Mr. Bell: Yes, I will make him my witness for the occasion and save putting him back on.

Q. About what day of the year was it?

A. Mr. Bell, it was in the fall of the year. I can't say exactly when. It is probably around the 1st of September.

Q. Was that before the suit had been filed or after this suit had been filed?

A. I am not absolutely sure whether that first conversation that I had with Mr. McCarrey was before the suit was filed or not.

Q. Was Mr. Morgan present?

A. Mr. Morgan was present upon one occasion when I was present to talk to Mr. McCarrey.

Q. Who else was in there, if you know.

A. Mr. Morgan, Grigsby, an attorney in Anchorage, was with me and I don't believe Mr. Agostino was present, no. Mr. McCarrey, Mr. Grigsby and myself and Mr. Morgan—Thomas Morgan.

Q. In that conversation was there anything said about the checks being issued?



(Testimony of Herman H. Ross.)

A. I believe something was said about the checks being issued, Mr. Bell, but I never saw one.

Q. Did you see any checks of any kind?

A. No, I don't recall having seen any check at all.

Q. Did you see the contract that has been signed by Mr. Morgan? [470]

A. No, I don't recall seeing the contract——

Q. Did they make any——

A. ——that was signed.

Q. Did they make any offer to pay you any money at that time?

A. They made no offer to pay me any figure.

#### Cross-Examination

By Mr. Boochever:

Q. How long were you in the office there with Mr. McCarrey, Mr. Ross?

A. Oh, I would say we were in there close to 45 minutes, possibly an hour.

Q. And they told you that the checks had been issued, didn't they?      A. I am not certain.

Q. You said that you thought they did a minute ago?

A. I think they did but I am not absolutely certain that they told me the checks had been issued, but I do know that Mr. McCarrey had told me about a week before—4 or 5 or 6 days before—that the contract had not been signed by Mr. Morgan.

Q. But you did know that the checks had been issued, is that right?

(Testimony of Herman H. Ross.)

A. I think something was said about the checks being issued and I cannot say definitely but I would say—my guess would be that there was talk of the checks having been signed, yes. [471]

Q. You did know, too, that Mr. Agostino had never furnished a list of that equipment or a bill of sale of the equipment, you know that, too, didn't you? A. That I don't know.

Q. You don't know that? A. No.

Q. You didn't know that at the time?

A. I don't think he did but I don't know of that of my own knowledge.

#### Redirect Examination

By Mr. Bell:

Q. Was there any request made by Mr. McCarrey or Mr. Morgan—Mr. George Morgan—upon you and/or Mr. Grigsby to furnish an itemized statement of that equipment in that conversation?

A. Not that I recall.

Mr. Bell: I think that is all.

#### Recross-Examination

By Mr. Boochever:

Q. You did know that on July 19th Mr. Morgan had written Mr. Butcher asking for such a list and telling that the agreement was all O.K. if he would just give that list, didn't you?

A. I think that letter had been written. I am pretty sure that the itemized list had been called for.

Mr. Boochever: That is all.

The Court: Another witness may be called.

The Court: Court will stand in recess until 19 minutes past eleven.

(Short recess.)

The Court: Without objection the record will show all members of the jury present, and another witness may be called.

BASIL I. ROWELL

called as a witness herein, being first duly sworn, testified as follows:

Direct Examination

By Mr. Boochever:

Q. What is your name, sir? A. Rowell.

Q. What is your full name? A. Basil I.

Q. Are you know as Ted Rowell?

A. That is right.

Q. What is your occupation, Mr. Rowell?

A. I am engaged in the lumber business.

Q. Are you on your own in the lumber business?

A. Yes, there is a group of us have a mill down at Pelican.

Q. Is the Columbia Lumber Company in any way involved in that group?

A. No, they are not.

Q. What was your occupation in 1948?

A. I was manager of the Columbia Lumber Company at Whittier. [473]

Q. And were you in that post long?

A. Well, I held in that capacity up until I had

(Testimony of Basil I. Rowell.)

to leave there and go south last fall—early fall.

Q. Now, were you there in the spring of 1948?

A. Yes, I was.

Q. And did you see Mr. Bruno Agostino at any time during the spring of 1948?

A. Yes, I saw him several times.

Q. When was about the first time that you recall seeing him in the spring of 1948?

A. Oh, I would say it would be the latter part of March or the first part of April.

Q. Who was with you when you went to see him then?      A. Mr. Lambert.

Q. Was any conversation had with Mr. Agostino at that time?

A. Well, yes, to the effect that he wasn't logging, of course.

Mr. Bell: Now, I move to strike that as not responsive to the question.

The Court: I didn't understand that.

Mr. Bell: Of course is a conclusion and not a statement of fact.

The Court: That is not important, overruled.

Q. (By Mr. Boochever): What conversation did you have with Mr. Agostino at that time, Mr. Rowell? [474]

A. Well, he was desirous—

Mr. Bell: Now, I move to strike that. He was asked what the conversation was.

The Court: Just answer your counsel's question as to what the conversation was.

(Testimony of Basil I. Rowell.)

The Witness: As regards the sale of the camp.

Q. (By Mr. Boochever): What did Mr. Agostino say in that respect?

A. He wanted to see Mr. Morgan.

Q. And what did you tell him, if anything?

A. Well, if I told him anything I told him that I would get in touch with Mr. Morgan and convey that to him.

Q. And did you or Mr. Lambert get in touch with Mr. Morgan?      A. Yes, I did.

Q. What instructions did you receive to tell Mr. Agostino?

A. Mr. Morgan would be up in this part of the country shortly and he would make it a point to go down to Whittier and would go out to see him.

Q. And did you go back to see Mr. Agostino?

A. I went out there. We took a wire out to show him to the effect that Mr. Morgan would be there and would be out to see him.

Q. And was there anything in that wire to the effect that Mr. Morgan was buying Mr. Agostino's property?

Mr. Bell: I object to that, the wire would be the best evidence. [475]

Mr. Boochever: That is probably not proper foundation.

Q. Do you have that wire, now?

A. No, I don't.

Q. Do you know where it is?

A. No, I wouldn't.

(Testimony of Basil I. Rowell.)

Q. What did the wire contain?

Mr. Bell: I object to that until the original wire is accounted for and effort has been made to produce the best and this secondary evidence would not be competent until the best evidence is admissible.

The Court: As I recall, Mr. Morgan or some other testimony, I think it was Mr. Morgan testified that he did not have possession of the wire and Lambert testified that he didn't have it and so far as I can tell the way is open to supply secondary evidence of the contents. The objection is overruled.

Q. (By Mr. Boochever): What did the wire contain as near as you can recall?

A. That he would be up to Whittier and would make it a point to go out and interview Mr. Agostino.

Q. Did the wire say anything to the effect that he was buying the property of Mr. Agostino?

Mr. Bell: I object to that as leading and suggestive.

The Court: Undoubtedly is leading; objection is sustained.

Q. (By Mr. Boochever): Did you show that wire to Mr. Agostino? [476] A. Yes, I did.

Q. And what did Mr. Agostino do?

A. He said that that was all right that he was satisfied.

Q. And then, subsequently, do you know what Mr. Lambert did?

A. I don't quite understand that?



(Testimony of Basil I. Rowell.)

Q. Did he do anything in connection—what was his job there?

A. He was a contractor there.

Q. And what was he contracting to do?

A. Log.

Q. And do you know whether there was any timber purchase made in that area?

A. Yes, there was.

Q. I show you agreement here and ask you if you can identify it?

A. Yes, this is the timber contract.

Q. Would you repeat that loud enough?

A. This is the timber contract that was let for that specific piece of ground.

Mr. Bell: We object, Your Honor.

Mr. Boochever: I haven't offered it yet.

Mr. Bell: We object to him testifying to an instrument and calling it an original contract when the instrument itself shows that it is not a signed instrument at all.

Mr. Boochever: No one has testified that it is the original contract, Your Honor. [477]

The Court: There is nothing to object to yet, that I know of.

Mr. Boochever: I would like to have that marked for identification.

The Court: It may be so marked for identification. Objection to whatever effect it may be is overruled at this time.

Mr. Boochever: Your Honor, at this time I would like to suggest a stipulation to counsel that

(Testimony of Basil I. Rowell.)

might speed this trial up if he would come forward to the bench.

(Statements taken at the Bench.)

Mr. Boochever: Your Honor, strictly speaking, this witness probably is not capable of introducing this in evidence. We can recall Mr. Morgan for that purpose. We have just secured this copy of the agreement from the Juaneau office but it is the true copy of the original agreement which is in the Forest Service office. Of course we can have Mr. Morgan recalled, if they want, to state that this came through his regular office records and is a true copy, otherwise, if the counsel is willing to stipulate that it is a copy of the agreement then it will be unnecessary to call Mr. Morgan for that purpose and speed the trial up accordingly.

Mr. Bell: We will not agree to that because it is not a certified copy; it isn't signed.

The Court: It wasn't—

Mr. Boochever: Your Honor, we just secured it from the [478] mail and asked for the only copy that was in Mr. Morgan's office and that is the only one he has and has had any control over.

The Court: Well, counsel refuses—

Mr. Bell: We refuse to stipulate.

Q. (By Mr. Boochever): You testified, I believe, that you showed Mr. Agostino a wire saying that Mr. Morgan would come up?

A. That is right.

(Testimony of Basil I. Rowell.)

Q. Did Mr. Morgan subsequently come up to Barry Arm?      A. Yes, he did.

Q. When was that?

A. Right close to the middle of April, maybe a few days before, I am not exactly sure of the date but it was awfully close to the middle of April.

Q. When Mr. Morgan came up did you go out to see Mr. Agostino?      A. Yes, he did.

Q. Who was present at that time?

A. I went out with him and we met Mr. Lambert out there and the three of us went down to Bruno's camp.

Q. And did any conversation take place between the plaintiff, Mr. Agostino, and Mr. Morgan, Mr. Lambert and yourself?      A. Yes.

Q. What was the conversation?

A. We looked over the equipment at first and then we all sat down on a log on the beach and Mr. Morgan asked Mr. Agostino [479] what he wanted for the camp and equipment.

Q. And what did Mr. Agostino say?

A. Said he wanted \$19,000.00.

Q. And what did Mr. Morgan reply, if anything, to that?

A. He told him that that price was too high, that the company wouldn't be interested at that figure.

Q. Was any further proposition made?

A. Yes, I heard Mr. Morgan say something about leasing it.

(Testimony of Basil I. Rowell.)

Q. Did Mr. Agostino agree to that?

A. No, he did not want to lease it; he wanted to sell.

Q. Was any agreement made at all between Mr. Morgan and Mr. Agostino at that time and place?

A. Not at that time, no.

Q. Then was anything said in regard to Mr. Morgan coming back in two days or anything of that nature?      A. Not that I know of.

Q. And were you present when Mr. Morgan was talking to Mr. Agostino?

A. I was there, yes. We went out on the row boat to get out to the big boat outside.

Q. Did you have any occasion to talk to Mr. Agostino yourself when Mr. Morgan and Mr. Lambert were not present?

A. Yes, I talked to him a little bit, seeing that I knew him I always did when I went up there.

Q. What, if anything, did he say to you at that time? [480]

A. Just that he was desirous of *seeling* that he wasn't logging himself and couldn't get anyone to log with him.

Q. And did he have anyone there at that time setting up a logging camp or doing anything toward logging?      A. No.

Q. Were there any preparations being made at all to log?      A. No.

Q. And when you were there around the end

(Testimony of Basil I. Rowell.)

of March were there any preparations being made at that time about logging men being sent out?

A. No.

Q. What did Mr. Lambert—did Mr. Morgan give Mr. Lambert any instructions with regard to Mr. Agostino's property?

A. I heard him tell him not to touch anything.

Mr. Bell: Now, I didn't get to state my objection. I object to what statements Mr. Morgan made to Lambert unless it was in the presence of the plaintiffs or one of them.

The Court: Overruled.

Q. (By Mr. Boochever): What was your answer to that question?

A. I heard him tell him not to use any of the equipment, not to touch any.

Q. Of Mr. Agostino's?

A. That is right.

Q. Now, where did Mr. Lambert set up his logging camp, are [481] you familiar with where he set it up?

A. When he first moved in there he left the camp on the floats for a short period of time and then he went just up a little way from the head of the bay for a very short period.

Q. By the way, would that be the same area that could possibly be referred to as a pond?

A. That is right.

Q. Is that salt water in there?           A. Yes.

Q. Tide water?           A. That is right.

(Testimony of Basil I. Rowell.)

Q. Now, Mr. Rowell, prior to the time that Mr. Morgan—Mr. Rowell, did you ever have any occasion to get in touch with the United States Marshal here in Anchorage?

A. Yes, I did, I called him.

Q. What did you ask the Marshal, if anything?

A. I asked him if he could go out to the camp and explain to Mr. Agostino just what it was so that the men would be safe around there. I had a complaint from there and that is why I called—on the strength of that complaint.

Mr. Bell: I move to strike as hearsay—of people making complaints and so on.

The Court: Motion is granted and the jury will disregard that part of the answer. [482]

Q. (By Mr. Boochever): Just what you told the Marshal and not what anyone else told you?

A. I told him that things were very unsettled out there and the men didn't feel safe and I would like him to go out and explain to him that they had a right to be there.

Q. By "be there" what did you mean?

A. I meant Barry Arm.

Q. Did you mean on Mr. Agostino's—

Mr. Bell: I object to leading the witness.

Mr. Boochever: I am sorry.

Q. Now, Mr. Rowel, did you tell anything further to the Marshal at all?

A. No, I didn't.

Q. Did you ever make an attempt to get Mr. Agostino out of there by the Marshal?



(Testimony of Basil I. Rowell.)

A. Definitely not.

Q. Now, at the time Mr. Morgan and you and Mr. Lambert were present did you have occasion to examine the caterpillar tractors which Mr. Agostino claimed to own at that time?

Mr. Bell: I object to him having an occasion to do something, that is not a fact.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Did you examine the caterpillar tractors? A. I did. [483]

Q. What was their condition?

A. Very poor.

Mr. Bell: I object to that unless he is qualified as an expert on that line.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Have you been in the logging business for a long time, Mr. Rowell?

A. I haven't been in the logging business, no. I have been connected with it but not what you would call in it.

Q. Have you been connected with it for a long time? A. Yes, I have.

Q. In what capacities?

A. Through being a sawmill man.

Q. Are you familiar with logging equipment?

A. Yes.

Q. Have you examined it on a number of occasions?

A. I have been through quite a number of camps.

(Testimony of Basil I. Rowell.)

Q. And are you familiar with caterpillar tractors?

A. I have never worked on them directly but I have ordered an awful lot of parts for them.

Q. And did you examine these caterpillar tractors?

A. I was with Mr. Lambert, we did it together.

Q. And did you make any estimate with Mr. Lambert as to the amount of parts and so forth it would take and repairs to put [484] them in working condition for logging operations?

A. Yes, we did. The reason I went with him was because I thought he was qualified to do so much more than I was.

Q. What estimate—

Mr. Bell: I object to that. The estimate would be the best evidence if one was made and this witness admits that Mr. Lambert was the man qualified to make the estimate.

The Court: He may speak of his own knowledge. Overruled.

Q. (By Mr. Boochever): What estimate did you make?           A. \$10,000.00.

Q. And what was the condition of those tractors?

Mr. Bell: I object to that, he has shown that he is not an expert on caterpillars and would not know.

Q. (By Mr. Boochever): What was the condition of those caterpillar tractors at that time and place?           A. Very poor.

(Testimony of Basil I. Rowell.)

The Court: Objection is overruled.

Q. (By Mr. Boochever): Now, Mr. Rowell, have you ever evaluated caterpillar tractors and known what their purchase price were?

A. The company purchased one in Whittier and I saw numerous lists where they were listed for sale.

Q. And their prices? [485]

A. The prices ranged anywhere from about \$2500.00 up to, it all depended on their condition.

Q. What would you estimate the value of those two caterpillar tractors as they sat there in March of 1948?

Mr. Bell: I object to that for the reason he has specifically shown himself disqualified to estimate values.

The Court: Objection is sustained.

Q. (By Mr. Boochever): What other equipment was there, Mr. Rowell?

A. Well, there was a hoist there—an International hoist.

Q. And what was its condition?

Mr. Bell: I object to that, that is just a conclusion—what was its condition—that would be just a conclusion of the witness.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): What was its condition?

A. It was in fairly good condition except for one main driveshaft which was bent.

(Testimony of Basil I. Rowell.)

Q. Was it a type of hoist or donkey engine that would be well fit for logging in that area?

Mr. Bell: I object to that, he has said he is not a logging man, he is a mill man.

The Court: He hasn't shown himself qualified to pass upon [486] logging. Objection is sustained.

Q. (By Mr. Boochever): Are you familiar enough with the equipment used in logging to know what a good type donkey hoist engine would be for logging operation?

Mr. Bell: I object to that for the reason that he has stated positively that he is not——

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Are you familiar enough with the logging business to know what would be a good type of donkey engine there for use in logging operations? A. Yes.

Mr. Bell: I object to that for the same reasons above stated.

The Court: Overruled.

Mr. Bell: Move to strike the answer.

The Court: Motion is denied.

Q. (By Mr. Boochever): In regard to that donkey engine hoist, what was it in regard to logging operation, was it a good type for it?

Mr. Bell: I object to that. It would be purely a conclusion. He admits that he is not a logging man in any way.

The Court: He claims now he is qualified. The objection [487] is overruled.

(Testimony of Basil I. Rowell.)

The Witness: Well, no, it wouldn't, it would be all right in my estimate—it would be all right for pond work, light work, but it was not suitable for heavy logging.

Q. (By Mr. Boochever): What would be its value to a logging concern?

Mr. Bell: I object to that; it is not shown—the value.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Do you know what the value of that type of machine would be?

Mr. Bell: I object to that for the reason he has testified he is not familiar with the values and to go at it in another way would be incompetent, irrelevant and immaterial and not within the issues, no proper foundation laid.

The Court: The objection is overruled.

Q. (By Mr. Boochever): Would you answer the question, please?

A. We made up a unit at the plant to send out there to do the work which this same donkey could have done.

Q. And how much did that cost to make up?

Mr. Bell: I object to that for the reason it is incompetent, irrelevant, and immaterial and not within the pleadings and has no purpose whatsoever in this lawsuit.

The Court: Objection sustained. [488]

Q. (By Mr. Boochever): What would be the

(Testimony of Basil I. Rowell.)

value of that donkey engine Mr. Agostino claimed to a logging outfit?

Mr. Bell: I object to it for the same reason.

The Court: Objection is sustained.

Mr. Boochever: Your Honor, I believe we have qualified him to testify as to the value.

The Court: He hasn't testified yet that he knows what the value is or that he has not any experience which would qualify him to know the value of a donkey engine.

Q. (By Mr. Boochever): Have you had occasions to evaluate donkey engines suitable for logging operations?

A. We made up a unit to send out there to handle the logs and the riders in the log pond.

Q. What would the value, would you answer my question if you do know, what the value would be of that type of an engine?

Mr. Bell: I object to that. He has already disqualified himself by his testimony.

The Court: He has qualified himself against so this time he is qualified. Overruled.

Q. (By Mr. Boochever): What would the value be to a logging outfit?

A. The unit we sent—

Q. Not the unit we sent. [489]

The Court: The question is—Do you know what the value of the Barry Arm Unit is?

The Witness: \$500.00.

Mr. Bell: I move to strike his answer as an endeavor to impeach one of their own witnesses who



(Testimony of Basil I. Rowell.)

said that he would hate to give over \$3500.00 for it.

The Court: Motion is denied.

Mr. Boochever: And I question as far as the testimony is concerned whether that is it.

The Court: That is a matter addressed to the jury; they must know what the testimony is. The Court is not permitted to tell them what the testimony has been.

Q. (By Mr. Boochever): Was there any other equipment out there that you saw?

A. There were some buildings.

Q. What buildings were there?

A. There was one main building—frame building and then a shop—combination shop with a leanto on one end for a caterpillar and a cabin.

Q. How far was the cabin from the main building?

A. Oh, off-hand I would say about fifty yards possibly.

Q. Now, was there any other equipment there?

A. There was an old No. 3 American sitting up on the bank.

Q. What is an old No. 3 American, what do you mean by that?

A. A portable sawmill unit. [490]

Q. Are you familiar with sawmill units?

A. Yes.

Q. Are you familiar with their values?

A. Yes.

(Testimony of Basil I. Rowell.)

Q. Have you been in that business a long time?

A. Yes, I have.

Q. What was the condition of this International sawmill unit?      A. Not very good.

Q. Can you describe its condition to the jury?

A. Yes. It was just mounted on a wooden frame. It was a very small unit suitable for handling peewee logs only and not the general run of logs which you get from a camp. And it had been sitting out in the weather. There was no protection over it and the condition was very bad.

Q. Was it set up so that it could operate at the time?      A. No.

Q. What would you say its value was at that time and place?

A. Well, from my personal viewpoint I wouldn't say it had any.

Q. Would it have any value to a logging company?

Mr. Bell: Now, I object to that, that would not be the question here.

The Court: Objection is sustained.

Q. (By Mr. Boochever): Would it have any value to a sawmill company? [491]      A. No.

Mr. Bell: I object to that.

The Court: The answer may be stricken; witness is instructed not to answer until counsel has at least a reasonable chance to object. And the objection is sustained.

(Testimony of Basil I. Rowell.)

Q. (By Mr. Boochever): Would it have any reasonable market value in the general market?

A. No.

Q. Now, you testified that Mr. Morgan gave Mr. Lambert instructions in regard to Mr. Agostino's property not to use any of the equipment. Now, were any changed instructions ever given in that regard?

A. Not to Mr. Lambert, to my knowledge, no.

Q. Did you ever relay any instructions in that regard at any time?

A. Yes, but the only thing I did was to relay instructions not to touch anything at that time.

Q. And, then, subsequently, did you ever relay any other instructions?      A. Yes, I did.

Q. When was that?

A. Oh, I would say it was in the latter part of July or along way late-summer.

Q. What instructions did you give then? [492]

A. I sent out word that a deal had been made to purchase the property and as of that time they could use the things that were there.

Q. And did you give any instructions in regard to the two caterpillar tractors?

A. To put them in operating condition.

Q. Do you know whether anything was done to follow out those instructions?

A. Yes, the foreman there he made frequent visits into camp and into the headquarters at Whittier and he said that——

(Testimony of Basil I. Rowell.)

Mr. Bell: I object to what he said.

Q. (By Mr. Boochever): What he said would be hearsay, Mr. Rowell, just tell what was done.

The Court: What you know was done of your own knowledge and not what somebody else told you.

The Witness: I know there was considerable work done. We could tell that by the payroll that came into the office.

Mr. Bell: I move to strike his answer because that would purely be hearsay—payroll.

The Court: Objection is sustained and the motion is granted and the answer stricken.

Q. (By Mr. Boochever): Did you have occasion your self to do anything in regard to fixing up those tractors? [493]           A. No.

Mr. Bell: I object to what occasion he would have.

The Court: Overruled.

Mr. Bell: Move to strike the answer.

The Court: The use of the word "occasion" should be omitted entirely. To ask the witness if he had occasion means precisely nothing. Ask him whether he did anything.

Mr. Boochever: Very well, your Honor.

Q. Did you ever order any equipment for those tractors?

A. I ordered parts for them, yes.

Q. And did you prepare payrolls or authorize payrolls to pay mechanics in that regard?

(Testimony of Basil I. Rowell.)

Mr. Bell: I object to that as being incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: Yes, I did.

Q. (By Mr. Boochever): And do you know approximately how much was expended on the repair of those two tractors?

Mr. Bell: I object to that for the reason that the payrolls and the orders would be the best evidence.

The Court: Overruled.

Mr. Bell: Exception.

Q. (By Mr. Boochever): Would you answer the question? [494]           A. Well, yes, I did.

Q. Approximately how much?

Mr. Bell: I object to that for the same reason.

The Court: Overruled, you may answer.

The Witness: Over several hundred dollars.

Q. (By Mr. Boochever): What was that for?

A. That would be for parts.

Q. And how about in regard to work done on them?

A. The work done on them would amount to quite a bit more.

Q. How much would you say was spent by Columbia Lumber Company on those two caterpillar tractors, if you know?

Mr. Bell: I object to that; that would purely be a guess and a conclusion.

The Court: Answer, if you know; if you don't know say so.

(Testimony of Basil I. Rowell.)

The Witness: I don't know that.

Mr. Boochever: If there is no objection I will have these marked as one for identification.

The Court: That is right. They may be so marked.

Q. (By Mr. Boochever): I show you Defendant's Exhibit "O" for identification and ask you if you can identify these slips of paper?

A. Northern Commercial invoices.

Q. Did they go through your office at Whittier?

A. Yes, they did.

Q. And you have seen them there?

A. Yes, I have.

Q. What do they represent payments on? Look them over carefully and then answer.

Mr. Bell: I object to them unless it is shown that they had something to do with this particular property.

Mr. Boochever: That is obviously what we are trying to find out.

The Court: Overruled.

The Witness: Yes, those are all caterpillar parts.

Q. And for what tractors were those parts ordered?

A. Well, I couldn't say definitely because the numbers are altogether and I couldn't differentiate one from the other. There were several things ordered and I don't know definitely that they were for one machine or the other.



(Testimony of Basil I. Rowell.)

Q. Were they for Columbia Lumber Company tractors or do you know whether they were for the Columbia Lumber Tractor D-7 that they had before dealings with Agostino?

A. I would say they weren't.

Q. Do you know for what two tractors they were for?

A. There were only three tractors there—there was a new one and the two old ones.

Q. By the "two old ones" you mean the tractors that you saw at Agostino's place in March? [496]

A. That is right.

Mr. Boochever: At this time I wish to offer these bills in evidence as Defendant's Exhibit "O."

Mr. Bell: We object to them for the reason they are incompetent, irrelevant and immaterial, not properly identified and not shown to have anything to do with this lawsuit or it is not within the pleadings of the case.

The Court: The witness under leading questions testified that they did have something to do with it and therefore they are admitted.

Mr. Bell: Exception.

The Court: They may be read to the jury. Do counsel care to stipulate they may not be read now and they may be read by counsel on either side at any time?

Mr. Boochever: If counsel would stipulate I would like to read the summary of amounts.

(Testimony of Basil I. Rowell.)

Mr. Bell: If you are going to read you had better read it all.

Mr. Boochever: "Northern Commercial Company—" Do you want me to read the print on the heading of the paper?

Mr. Bell: No, you need not read that but I would like you to read the date.

Mr. Boochever: "September 4, 1948, sold to Columbia Lumber Company, Whittier, Alaska. Ship to: Same, Camp No. 1, Whittier, Alaska. Cat. Parts: R.B. two 2F5566 Roller Assembly, [497] \$38.60 each \$77.20; two 1F7930 Roller Assembly, \$26.75 each \$53.50; twenty 7B7453 Teal. (7B453) ext. tax, \$4.50 each \$90.00; four 6B7115 Bracket Assembly \$26.40 each \$105.60. Total \$326.30. Paid, Ross.

"July 17, 1948. Sold to Columbia Lumber Company, Whittier, Alaska. Cat Parts. R.B. One-hundred 1A1493 Bolts 20-cents each \$20.00; one-hundred 1B4433 Nuts 10-cents each \$10.00; one-hundred 3B4510 L. washers 02-cents each \$2.00; six 7B2438 shoes 22" \$9.55 each \$57.30. Total \$89.30. Camp I.

"7/14/48. Sold to Columbia Lumber Company, Whittier, Alaska. Cat. Parts. Harb. two 3B551 diesel plug 20-cents each 40-cents; four 7B2438 granser \$9.55 each \$38.20; one-hundred 1A1493 bolt 20-cents each \$20.00; one-hundred 3B4510 L. washers \$1.90 e; one-hundred 1B4433 nuts \$8.70 c. Total \$69.20. Camp One. Charge. Thomas A. Morgan.

"8/20/48. Sold to Columbia Lumber Company,

(Testimony of Basil I. Rowell.)

Whittier, Alaska. At Camp No. 1. Twenty-four 4A332 Elements \$1.30 each \$31.20; six 3B8998 Fittings. Fittings B.O. from Fairbanks. J.C.

“8/18/48. Sold to Columbia Lumber Company, Whittier, Alaska. At Whittier, Alaska. Cat Parts. Harb. Two 2B6087 forks \$6.15 each \$12.30; four 2B6043 Rings \$2.80 each \$11.20; two 2B6109 nuts. Total \$23.50. One axle assm. for D-7 Arch Hyster. Shorts have been B.O. from Fairbanks.”

Q. Now, you testified that you gave instructions for them to repair those tractors. Subsequently, did you give any further [498] instructions in regard to those tractors?

Mr. Bell: I object to any further testimony along that line because it would not be binding upon these plaintiffs what he would tell his employees—it would not be binding on these plaintiffs.

The Court: Overruled.

Q. (By Mr. Boochever): Would you answer the question, please? A. Yes, I did.

Q. What instructions did you give in that respect?

Mr. Bell: Same objection.

The Court: Same ruling.

The Witness: I gave instructions later on to give everything back that was found.

Q. (By Mr. Boochever): Now, when did you leave the services of the Columbia Lumber Company? A. September 1st.

Q. And are you connected in any way with the Columbia Lumber Company at the present time?

(Testimony of Basil I. Rowell.)

A. No, I am not.

Mr. Boochever: No further direct examination, Your Honor.

The Court: It is now twelve o'clock. I think we had better suspend, if there is no objection we will resume the trial at 1:30. Is there any objection from the members of the [499] jury to coming back at 1:30? Please remember the hour, then, ladies and gentlemen. We are adjourned until 1:30.

You will remember in the meantime not to discuss the case among yourselves or with others and not to form or express an opinion until the case is finally submitted to you.

Mr. Davis: If the Court please, on Friday we offered as exhibits the Amended Complaint in one case and the Third Amended Complaint in another of files in this Court and we agreed that we would present copies of those complaints in lieu of introducing the file. Now, insofar as the Grasser suit is concerned we have furnished a copy and the clerk and I have compared it with the original and at this time I believe it is in order to substitute that copy for the original file in the Grasser case.

Insofar as the Ellamar case is concerned, Mr. Ross presented us with a copy of the complaint but the complaint is not filled in as to dates or signatures and does not have attached to it the Exhibit A—the Conditional Sales Contract. And I think the Clerk and I have compared the copy as given and found it correct insofar as it goes.

(Testimony of Basil I. Rowell.)

Mr. Bell: Is that the Third Amended Complaint?

Mr. Davis: Third Amended Complaint.

Mr. Bell: We agreed the copy of the contract could be taken from the original complaint and attached to this copy.

Mr. Davis: That is acceptable with me. [500]

The Court: That is acceptable with me. Very well, the Clerk is authorized to detach the copy of the contract or agreements attached to the original complaint—to the Third Amended Complaint—which will go into evidence here and fill in whatever may be missing from it.

Mr. Davis: Fill in the missing dates.

The Court: And signatures and so on and anything of that kind that is missing so it will be a true copy of the Third Amended Complaint plus the copy of the contract or agreement which should have been attached to it in the first instance.

Mr. Bell: That is right. We agree to that.

The Court: Without objection then it is so ordered and these instruments will be considered in evidence, as appropriate exhibits under the numbers given to them originally.

(Whereupon, at 12:10 p.m., the trial was continued until 1:30 p.m., the same day.)

#### Afternoon Session

The Court: We will proceed with the trial of the case of Agostino and Socha Versus Columbia

(Testimony of Basil I. Rowell.)

Lumber Company. The Clerk will call the roll of the jury.

(Names of members of the jury were called and responded to.)

The Clerk: They are all present, Your Honor.

The Court: Is the direct examination concluded?

Mr. Boochever: Yes, Your Honor.

The Court: Counsel for plaintiff may examine the witness.

#### Cross-Examination

By Mr. Bell:

Q. Mr. Rowell, where is your lumber operation now? A. Pelican.

Q. Where is that?

A. That is on the northern end of Baranoff Island.

Q. And you left the employment of the Columbia Lumber Company in September, 1948, did you?

A. That is right.

Q. Was that the first—I believe you stated September 1st, 1948? A. Yes.

Q. You examined this paper which has been marked Exhibit "O" did you not?

A. Yes, I looked at the sheets and made the statement that they were N. C. invoices. [502]

Q. Now, do you know whether or not those were ordered for a DC-7 or a—I mean an R.D. 7 or an R.D. 8 or a D.7 or D.8?



(Testimony of Basil I. Rowell.)

A. The only way that can be verified is by checking numbers.

Q. And you don't know how to do that by checking these?

A. I would have to have the original order and all the records in order to do it.

Q. And you don't have those?           A. No.

Q. So you don't know what part of these orders were made for the caterpillars that had formerly belonged to the plaintiffs in the case?

A. Mr. Gilbert told me that.

Q. Don't tell me what somebody told you. Do you know yourself what part of them were for the two cats that formerly belonged to the plaintiffs in this case or whether it was for some other cat?

A. Well, from my own observation I would say that it was for the old ones because the other one was brand new. It did not need all those parts.

Q. Do you operate other caterpillars belonging to the Columbia Lumber Company in other camps?

A. There was one other.

Q. But you had some other camps operating, did you not, operating?           A. Yes. [503]

Q. How many other camps did you have operating at that time?

A. There was one in at Montague Island. He was an independent contractor.

Q. Did he have caterpillars there?

A. Yes.

Q. How many did he have?

(Testimony of Basil I. Rowell.)

A. I am not sure. I never visited. I know it was two, possibly three. I never went to the Island.

Q. What other camp did the Columbia Lumber Company own or operate at that time?

A. They didn't operate those. That was a contractor.

Q. Well, they furnished the equipment at Barry Arm. You helped take the equipment in for that one, didn't you.

A. We sent it out there, yes.

Q. Well, it was your equipment, wasn't it?

A. Yes, the equipment belonged to the company and was worked out with the contractor.

Q. Now, then, did you do the same way with any of the other camps?

A. Well, they had their camps running when I took over the job as manager and that I couldn't say because their equipment was already there and I really don't know who had purchased them originally.

Q. Now, then, the parts that you ordered for various cats, you would order them through the Northern Commercial Company, would [504] you?

A. That is right.

Q. You had about four or five other cutters in the woods, did you not—other camps in the woods cutting logs—or maybe more than that, how many did you have?

A. No, there was Kings Bay, that was part of the same contract as Montague, that is, one man

(Testimony of Basil I. Rowell.)

had his camp divided into two separate camps but it was under one contract. The other men we got logs from were men who had logs to sell and we just bought their logs.

Q. Did you order groceries and repairs for all these other people, too?

A. For this one man, yes.

Q. You did for the other camps, did you not?

A. That is what I mean, the man who had Montague Island and Kings Bay.

Q. What was the number of this camp at the mouth of Mosquito Creek?      A. Camp One.

Q. Now, where was Camp Two?

A. Montague.

Q. Where was——

A. I will change that. Camp One was Kings Bay and Montague was Camp Two.

Q. Where was Camp Four? [505]

A. We didn't have one.

Q. You don't have any idea whether you ordered these things for someone else or for the mouth of Mosquito Creek?

A. When I ordered them from the office for the different camps I always designated on there where they were for—Camp One or for Trobridge.

Q. And if they were for Camp One when would you mark that on—when you made the order—at the time you made the order?      A. Yes.

Q. You wouldn't mark it on later at any time?

(Testimony of Basil I. Rowell.)

A. I would put that on when the order was put in.

Q. And these are carbons and it would show?

A. No, I did not make those. Those are N. C. invoices.

Q. But the order you would make you would have it marked Camp One, Camp Two or Camp Three?

A. I would have it returned in that way, yes.

Q. So you don't know of your own personal knowledge where this equipment went to that you ordered here, do you?

A. Well, the equipment came in. I checked it over with our original order. That is how I knew where it was to go.

Q. And you never saw it any more after it came to you at Whittier?

A. I would send it out to the camp, wherever it was ordered for.

Q. There are two of these that are marked Camp One. It seems [506] to be the only two that are marked in the original invoices as Camp One, can you check there and see if there is any more than this one dated September 4, 1948? And, then, I believe there is another one there, isn't there, I believe, marked Camp One? Now, that one, that is marked Camp One, that is 8-20-48, isn't it?

A. Yes.

Q. Is there any more marked Camp One?

A. Well, no, they didn't mark them all when

(Testimony of Basil I. Rowell.)

they made out the invoices, and most of the——

Q. The others, then, don't have the Camp One mark on——

A. No, they didn't always do it—the N. C. Company didn't.

Q. Some of those could have been ordered though, of course, for other camps? A. Yes.

Q. Did you ever see the tractors any more after——

Mr. Boochever: Excuse me. I wish to object to that question as being hypothetical and conjectural to prove what happend.

The Court: Objection denied.

Q. (By Mr. Bell): Did you ever see the caterpillars after April 10, 1948?

A. No, I did not go up into the woods—back into the woods.

Q. And from that date on you don't know of your own personal knowledge what happened to the cats other than what people told [507] you, do you?

A. What the foreman of the camps told me.

Q. On the day that you were there sitting on the log with Mr. Morgan and Mr. Agostino and Mr. Lambert, the price that you understood the price to be—\$19,000.00? A. That is right.

Q. Now, could you be mistaken about that and it was \$19,000.00 for the equipment and machinery and \$6,000.00 for the buildings.

A. No, the question I heard was just “what do you want for everything—for the campsite and

(Testimony of Basil I. Rowell.)

everything?" The only quotation I heard was \$19,000.00.

Q. Now, when you first went there with Mr. Lambert it was in March, wasn't it?

A. Latter part of March, I think.

Q. And was there snow on the ground at that time? A. Yes.

Q. Pretty heavy snow there, I believe, isn't there, in that valley?

A. Well, most of the time, about that time.

Q. How near the shore did you pull up with your boat at that time?

A. The water is quite deep there, you can get in fairly close.

Q. How near were you to Bruno Agostino's camp? A. You mean his cabin? [508]

Q. Well, no, his regular camp?

A. We were right there that time I went out with the wire, yes.

Q. I mean, how close did you get your boat up to the camp?

A. Oh, off-hand I would say we went 150 yards—200 yards, something like that.

Q. Did you anchor out in the sea or did you go ashore with your big boat or pull up to a wharf?

A. We went ashore in a row boat.

Q. And you left the large boat anchored outside? A. That is right.

Q. Did you leave someone on the boat?

A. Yes, we didn't have the boat ourselves.



(Testimony of Basil I. Rowell.)

Q. You had just chartered a boat for the occasion, had you?      A. Yes.

Q. When you went in that time you went on ashore with your small boat, and where did you first see Bruno when you got ashore?

A. Well, I noticed that any time we went out there he would see you coming and he would walk down to meet the boat.

Q. And he met you on the bank down at Mosquito Creek?

A. Right there or shortly afterwards.

Q. Was it high tide or low tide?

A. I don't remember.

Q. On that occasion, Mr. Lambert and you were the only two [509] in the boat that went ashore, weren't you—the little boat?

A. I don't recall whether we rowed ourselves *our* whether the boatman took us in and went right back—sometimes we do and sometimes we don't.

Q. When you talked to Bruno did you go up to the camp—to the log camp there?

A. No, not at that time.

Q. Just talked on the bank of the creek?

A. Yes.

Q. And would you please tell me what you said to Bruno and what Mr. Lambert said and what Bruno said to you?

A. Well, at that time the purpose of our visit was to take out word that Mr. Morgan would go out to see him when he came to Whittier.

(Testimony of Basil I. Rowell.)

Q. I am asking you about the first time in March—first time in March; you were there two or three times in March with Mr. Lambert, weren't you?      A. No.

Q. You were there only once?

A. Only the once.

Q. And that time was when you took the telegram?      A. We took a telegram out there.

Q. And you told Mr. Agostino that what Mr. Lambert had said—what you had said what Mr. Lambert had said what Mr. Morgan had said in the telephone conversation, did you? [510]

A. No, I don't recall—I had this wire. I showed him the wire to the effect that Mr. Morgan would be there and read him the wire.

Q. What was the purpose of going out at that time?

A. Mr. Lambert said that something was going to have to be done because he didn't feel safe or any of the men because they had been threatened.

Q. You made some arrangement with Bruno so you could land your equipment there?

A. So the men would feel safe in working there.

Q. That was after you had talked to the United States Marshal, was it?      A. Yes.

Q. What Marshal did you talk to or what Deputy did you talk to?

A. I forget his name. It was in Anchorage.

Q. Here in Anchorage?      A. Yes.

Q. And you talked with him on the telephone?

(Testimony of Basil I. Rowell.)

A. Yes, I did.

Q. And he told you, I believe, you would have to get a warrant out if you wanted him arrested, that he had a right there?

A. He said I would have to have a warrant and I didn't want to do that. [511]

Q. What did you want him to do—to come out there and remove Bruno?

A. I wanted him to explain to him that these men had a right to be over there working so they would feel safe.

Q. And he told you that he wouldn't do that, that was a civil matter?

A. He wanted, like you say, he asked for a warrant and I didn't want to do that.

Q. Now, did you do that at the instance and request of Mr. Morgan?

A. No. I did that at the request of Mr. Lambert.

Q. Mr. Lambert? A. Yes.

Q. You are sure of that—it was Mr. Lambert who had you call the United States Marshal?

A. It was Mr. Lambert who came in and had me call him. He said that something definitely had to be done because neither he or the men felt safe.

Q. Nobody was down there at that time—there was nobody there? A. Oh, yes.

Q. I thought you told me it was in March that you made that trip down there and showed him the telegram, wasn't it?

(Testimony of Basil I. Rowell.)

A. It was either the end of March or the first part of April.

Q. And you testified that your trip down there was after you had talked to the United States Marshal; now you didn't have any [512] men there until you showed the telegram to Bruno and he said "You can land your men and come ashore," did you?

(No response.)

Q. You never had any men there until Bruno consented for you to come there?

A. There were men there in the latter part of February.

Q. Where?           A. In their own camp.

Q. Where?           A. On the float.

Q. That float was in a bay several miles from there, wasn't it?

A. The float was right where they rafted the logs.

Q. In that Mosquito Creek bay?           A. Yes.

Q. Are you sure of that?

A. The camp was left and they were towed in there on floats and it was left there for sometime until they got a chance to move it up.

Q. You know that there was no camp there when you landed there the day with the telegram?

A. Mr. Lambert had come in to me with the complaint.

Q. Mr. Lambert had been back and forth several times to the mouth of Mosquito Creek?

(Testimony of Basil I. Rowell.)

A. Yes, frequently. [513]

Q. And your camp was in a bay away from there and had to be towed into the mouth of Mosquito Creek? A. Yes, that is right.

Q. Now, just to refresh your memory, not to try to confuse you at all, Mr. Rowell, the day you went in there with the telegram your camp wasn't yet in that point, it was at the bay, wasn't it?

A. He had men working around there.

Q. It was in Hobo Bay, wasn't it?

A. Hummer Bay.

Q. And how far is Hummer Bay from the mouth of Mosquito Creek?

A. Possibly 10 or 12 miles, something like that.

Q. And that is across country quite a distance in that country? A. It is by water.

Q. By water it is that far? Now, then, after you came in do you know how long it was before the camp came in—the barges with the camp and all the equipment on them was pulled in there and fastened to the shore?

A. They went in there, as I recall, somewhere around the latter part of March—1st part of April.

Q. They did that—24th or 25th or 26th of March.

A. It was around right in toward the latter part of March.

Q. And the day you showed him the telegram was the 24th of [514] March?

A. I didn't say it was the 24th.

Q. I am asking if it wasn't?

(Testimony of Basil I. Rowell.)

A. I didn't say for sure, my knowledge it was about the end of March or the 1st of April. It was only a short time before I went out there with Mr. Morgan.

Q. And your purpose for going in there with this telegram for Mr. Morgan was to appease Mr. Agostino so that you could start operations there?

A. That is right, on a complaint from Mr. Lambert.

Q. Now, you, up to that time then you hadn't started any operations there, had you?

A. Just the usual spring proposition.

Q. But you didn't have any men there, did you?

A. Mr. Lambert was up there, I believe, in February sometime. He had two or three men with him.

Q. You mean that Mr. Lambert was up there cutting timber or doing anything like that?

A. Oh, no.

Q. He was——

A. He was up at Hummer Bay.

Q. In Hummer Bay, that is what you are referring to all the time, isn't it? A. No.

Q. Now, where was the camp then on the 24th day of March, [515] 1948, was it in Hummer Bay or was it in the mouth of Mosquito Creek?

A. I have no way of knowing.

Q. The fact that you went there and landed and talked to Agostino and showed him the telegram, you still wouldn't know whether the camp was there or not?

A. I know it was sometime before I went up



(Testimony of Basil I. Rowell.)

there with Mr. Morgan that all this took place and that is why I said about the end of March or the 1st part of April.

Q. The date that Mr. Morgan went there was the 10th of April or approximately?

A. About the middle of April.

Q. But you were down there before you delivered the telegram to Mr. Agostino?      A. Yes.

Q. And that was about the 24th of March, wasn't it?

A. I wouldn't say, about that time, I won't say any definite date, I know it was toward the end.

Q. But the purpose for delivering the telegram was to assure Mr. Agostino that he would be taken care of in the deal and to let the boats land and turn everything over to you people?

A. There was no mention made of any deal. The only thing in this telegram. I told him that Mr. Morgan would be out to see him. There was no mention made of any deal in that telegram and I had no authority to make any such quotation. [516]

Q. You tell the jury then that because Mr. Morgan was going to pay Mr. Agostino a friendly visit on the 10th of April that Mr. Agostino turned over his lumber camps, his logging woods and everything to your man, Lambert, is that your contention?

A. He didn't turn it over.

Q. They came right in and landed and tied up there and started operations, didn't they?

(Testimony of Basil I. Rowell.)

A. He didn't have to land on the other property to get in there.

Q. But he did do it anyway, didn't he do it, you know that, don't you?

A. No, I wasn't there.

Q. On the 10th when you came down there the men were cutting timber, weren't they, 10th of April when you and Mr. Morgan got there?

A. I think they were, yes, sir.

Q. And did you know whether or not the log house or the big bunkhouse and mess house, we will call it, or cook shack, do you know whether that was used for a storage there for quite a while or not at first?

A. Whose—one are you referring to?

A. There is just one there now. Please remember that we never contended but that there was one—the log house that belonged to Agostino and Mr. Socha at the mouth of the Barry Arm camp, do you know whether or not that was used for storage? [517]

Mr. Boochever: Your Honor, that is outside the scope of the direct examination; it is improper cross-examination.

The Court: Overruled.

The Witness: I had never stored anything there; I didn't know anything about it if it was. I was in there at that time and there was nothing in it.

Q. (By Mr. Bell): And that was the 10th of April? A. Yes.

(Testimony of Basil I. Rowell.)

Q. Did you see Mr. Morgan any more after the date that you and he were there?

A. He made frequent trips down.

Q. I mean did you see him any more for the next week or ten days, say, after that 10th day of April after you were in there?

A. He spent some time at the mill, rather, just how long I wouldn't be prepared to say. It might have been one-day or two.

Q. On the 10th of April how did you and Mr. Morgan go?      A. Went by boat.

Q. By boat—one of your boats?      A. No.

Q. Whose boat was it?

A. It was the John L. Seed.

Q. And you just chartered it for the trip over there?

A. He was working for the company—going to do towing for the company. [518]

Q. It was one of the towboats that were later used by the company for towing logs out of that area?      A. That is right.

Q. Now, you got back home the same night you went out, did you?      A. Yes.

Q. And do you know where Mr. Morgan went immediately after getting back to Whittier?

A. No, I don't recall, but I imagine he stayed in Whittier because there was no way you could get out at that time.

Q. And all you can remember seeing there was

(Testimony of Basil I. Rowell.)

two caterpillars, one donkey, one frame building, one sawmill, are you sure that is all?

Mr. Boochever: I object to that question as too general—"all he saw there."

Q. (By Mr. Bell): All the property that you saw there that Bruno Agostino was at least attempting to sell to your boss, Mr. Morgan, or the Columbia Lumber Company?

The Court: Objection is overruled. He may answer that.

The Witness: We just made a quick survey and I would have to stop and think and possibly write it down to name it—to name the things I saw.

Q. (By Mr. Bell): When you testified on direct examination you testified that you saw a lean-to there, too? [519]

A. That was in the same building as the shop. It was just, in other words, by "lean-to" I mean there was no front or back to the building or anything, it was just built on the back end of the shop. It was all on the same building, really. And then there was a cabin, of course, Bruno's own little cabin where he lived.

Q. And that is all you saw there, was it, was that all you saw?

A. That day we went out there.

Q. I hand you a photograph that has been marked Plaintiff's Exhibit Identification 38 and ask you if you have ever seen that building?

A. That is the main building.

(Testimony of Basil I. Rowell.)

Q. That is the main building there, is it, or the front end of the main building?

A. That is right.

Q. You saw that there, didn't you?

A. That is right.

Q. I will hand you Plaintiff's Exhibit Identification No. 39 and ask you to state if you have ever seen that?

A. That looks like the shop with that lean-to at the back end.

Q. Show me where the lean-to is? That is what you referred to?

A. Just that little roof over there. [520]

Q. You didn't see the garage building at that time, it was just the lean-to that you saw, was it?

A. No, I saw the shop, too.

Q. And you saw the garage building?

A. The shop and the garage, yes.

Mr. Bell: We offer Plaintiff's Exhibit 38 in evidence.

Mr. Boochever: We object to it, Your Honor, as improper cross-examination; that it is also repetitious, and they have introduced all sorts of pictures of their——

The Court: Overruled, it may be introduced.

Mr. Davis: I think the picture identified as 39 is already in evidence.

Mr. Bell: I offer in evidence Plaintiff's Exhibit Identification No. 39.

The Court: It may admitted.

(Testimony of Basil I. Rowell.)

Q. (By Mr. Bell): Didn't you keep an exact record of the cost of repairs on separate properties like caterpillars and different properties?

A. We kept track of the cost for each camp and each different piece of machinery but it wasn't segregated. The only way to do that would be to go through all the records.

Q. Haven't you any such records so that you could show us the actual record of each cost and who you paid it to?

A. No, I wouldn't have it down here; I am not connected with that any more. [521].

Q. Have you ever had?

A. Yes, it was in the office.

Q. Have you ever seen it since you have been here in Anchorage?

A. The total cost of preparing all that?

Q. Yes, the total cost, if you have it. Do you remember seeing a telegram that came for Bruno Agostino to your office in Whittier from the Forestry Service that you later caused to be delivered to Bruno?

A. No, I don't recall any particular telegram. There were quite a lot of them came there from different places but we didn't hold them, just passed them on.

Q. You did see this one that came from the Forestry Service at Juneau to Bruno Agostino?

A. No, I didn't see any telegram.

Q. Did you see a telegram that was from the For-



(Testimony of Basil I. Rowell.)

estry Service confirming Bruno's sale of 250,000 feet of logs?      A. I didn't see that.

Q. To refresh your memory, didn't you and Mr. Lambert and Bruno open it and didn't you and Mr. Lambert and Bruno read it together out there at Barry Arm?

(No response.)

Q. Do you know what happened to that telegram you showed to Bruno Agostino from Mr. Morgan?

A. No, I don't. I had it in my briefcase at that time. [522]

Q. It is a rather important message, you would consider it a rather important message, wouldn't it?

A. All telegrams are kept on file.

Mr. Boochever: I object to that first part in which counsel is testifying with regard to the message.

The Court: He can ask whether he thinks it.

Mr. Bell: If you will read the question, I think mine is just a question.

The Court: Counsel is in the habit of making a statement and then stating "didn't it."

Mr. Bell: I would like to have that one read, Your Honor, because I backed up on that and merely asked the question.

Mr. Boochever: I move to strike the part where counsel states it is a rather important message.

The Court: Motion is granted.

(Testimony of Basil I. Rowell.)

Q. (By Mr. Bell): Would you consider it a rather important telegram? A. Yes.

Q. Did you consider it a very important telegram then? A. Yes, I did.

Q. And did you put it away anywhere so that it could be preserved?

A. All telegrams are kept on file.

Q. Do you know where it was when you left the employ of the Columbia Lumber Company? [523]

A. I had no occasion to look but I presume it would have been on file unless it had got lost somewhere.

Q. And if it was on file there it would be easily found then, would it not? A. I don't know.

Q. You set up a good filing system while you were there?

A. You see they are very busy and all those papers and all those papers were put in a huge basket and it was only periodically that the lady in the office got around to do any filing. And then when she did—and it was possible only every week or two weeks she got around to do it.

Q. You say you carried that out in your brief case, where did you carry it?

A. Out to camp and back, the only—

Q. Then you never carried it anywhere else, did you? A. No.

Mr. Bell: All right, that is all.

Mr. Boochever: No further questions, Your Honor.

The Court: That is all. Another witness may be called.

Mr. Boochever: Defendant rests, Your Honor.

The Court: Any rebuttal testimony?

Mr. Bell: Yes. Do you mind a five-minute recess?

Mr. Davis: Before going on with rebuttal, Your Honor. During the early stages of this trial certain testimony was given by Bruno Agostino of oral conversations with a Mr. Lambert. [524] At that time objection was made to those statements, first, on the ground that a contract in question, if any was ever reached, was later reduced to writing; second, on the ground that Mr. Lambert had not been shown to be an agent authorized to act for Columbia Lumber. The Court at that time allowed the testimony, overruled the objection subject to the matter being connected up to show that Mr. Lambert was an agent of Columbia Lumber for this purpose.

Now, it is apparent at this time both on the plaintiffs' case and on our case that Mr. Lambert was not an agent of Columbia Lumber for this purpose, had no authority whatsoever to bind Columbia Lumber and I would like at this time to renew the motion to instruct the jury to disregard the testimony of Mr. Agostino about those oral conversations.

Mr. Bell: Your Honor, those have been connected up directly by Mr. Lambert. He said he made the deal at the time he was an employee of the Columbia Lumber Company and was working for them and that he made it after a telephone

conversation with Mr. Morgan directing him to do it. And, then, they couldn't deny it because they are estopped to deny it because they accepted the benefits of it and still have retained the benefits of it.

Mr. Davis: If the Court please, in the first place Mr. Lambert did not so testify, as I remember it, his testimony was that he had no authority from Columbia Lumber except authority [525] to carry the message that Mr. Morgan had given him and he told what the message was and it certainly wasn't any kind of a deal.

In the second place, we have denied from the beginning that we ever accepted any benefits whatsoever and the evidence bears us out in that respect.

The Court: One part of Agostino's testimony should not have been admitted in view of later developments and probably should not have been admitted then. Agostino, Ladies and Gentlemen, refers to Lambert as the logging superintendent for the defendant, Columbia Lumber Company, and afterwards he referred to him as a foreman for Columbia Lumber Company. That testimony you should disregard.

In fact, it is apparent now as a matter of law from the testimony that Lambert had only such authority as he received by telephone or telegraph from the office of the Columbia Lumber Company at Juneau in his capacity, whatever it was, working for the Columbia Lumber Company. It is clear that he had no authority to buy property—any

property—and certainly no property for a very considerable sum of money.

You may rightly consider the testimony given concerning the contents of the telegram which has been produced in evidence. The witnesses, apparently, do not entirely agree as to what was contained in the telegram or what authority was given to any body thereunder. [526]

The remainder of counsel's motion to strike all of the testimony of Lambert on the subject is denied, but that part is granted which has to do with Agostino's testimony concerning Lambert's position, first, as Superintendent within some capacity and afterwards as foreman.

Mr. Davis: Your Honor, I think the Court misunderstood the motion or maybe I didn't make it clear. My motion was to strike the testimony of Mr. Agostino concerning conversations he had with Mr. Lambert. Now, apparently, there were, according to evidence, three or four conversations between Mr. Lambert and Mr. Agostino prior to the time of this telegram. I think that those were improperly admitted at that time and should be stricken.

The Court: Motion is denied.

Court stands in recess until 2:25.

(Short recess.)

The Court: Without objection the record will show all members of the jury present. A witness may be called in rebuttal.

## KENNETH D. LAMBERT

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:

## Further Redirect Examination

By Mr. Ross:

Q. Mr. Lambert, in your direct examination you stated to the [527] jury, I believe, that it was practically impossible or impossible for two logging operations to be carried on at Barry Arm camp on Mosquito Creek at the same time, is that right?

Mr. Boochever: Object to that, Your Honor, as leading and in the second place improper redirect.

The Court: Objection is sustained upon the first ground. You can ask him whether he did testify to that.

Q. (By Mr. Ross): Did you testify on direct examination, Mr. Lambert, that two concerns could not operate at Barry Arm campsite of Mosquito Creek logging operations at the same time?

Mr. Davis: Your Honor, if he did testify to that we are repeating what went on in the main case and should not be put on in rebuttal.

The Court: That is right, unless it is preliminary to some other question.

Mr. Ross: It is preliminary, Your Honor, to show why.

Mr. Boochever: That was all on their direct case, Your Honor.



(Testimony of Kenneth D. Lambert.)

The Court: It is no part of rebuttal. If you want to reopen up your case and put in additional testimony that should have been offered in chief, that is another matter.

Mr. Ross: It was my understanding, Your Honor, we were opening up this case after changing certain pleadings for this purpose and also to prove value of certain property. [528]

The Court: Counsel requested leave to open it up to prove value.

Mr. Ross: And this, I think, Your Honor, is preliminary to proving the value of certain equipment there.

The Court: Objection is overruled; witness may answer. Exception will be noted.

The question is: Did you so testify, Mr. Lambert?

The Witness: Yes, I did.

Q. (By Mr. Ross): Mr. Lambert, explain why two concerns couldn't operate simultaneously in Barry Arm camp up Mosquito Creek at the same time?

Mr. Boochever: Object to that, that it is a conclusion and also improper.

The Court: Overruled.

The Witness: It could be done but it wouldn't be very practical at all; it would necessitate scaling of timber or branding of logs and they would have to be rafted together if two parties were logging in there and if rafts were made up the river it

(Testimony of Kenneth D. Lambert.)

would mean extremely high tides before they would be able to raft on an 8 or 9-foot tide. They would only have water for about an hour a day. And if the rafts were made up, why, they couldn't get them past the piling that was driven in the river. So I don't think it would be a very practical idea. [529]

Q. Is that piling you speak of piling you drove into the river or was it already there?

A. Piling I drove in to raft logs.

Q. After you drove piling into the river you say it was impossible for two parties to operate simultaneously unless the logs were branded.

Mr. Boochever: Object to that as a leading question, Your Honor.

The Court: Objection sustained.

Q. (By Mr. Ross): Now, during the meeting of you, yourself and Mr. Agostino and Mr. Morgan and Mr. Ted Rowell down at Barry Arm camp on or about April 24th or 23rd, something like that, where you stated price that Mr. Agostino and Socha were claiming for their equipment, will you state—or, at that time was there anything said, Mr. Lambert, about any little log cabin in which Mr. Agostino had sometimes stayed? A. Yes, there was.

Mr. Boochever: Your Honor, object, improper redirect as he testified about that meeting before.

The Court: That has already been gone over in direct examination and the objection is sustained;

(Testimony of Kenneth D. Lambert.)

nothing in the change of pleadings would warrant repeating it.

Q. (By Mr. Ross): Did you see Mr. Agostino and Mr. Morgan and Mrs. Morgan [530] and others together on or about the 10th day of April, 1948?

A. Yes, sometime around that date.

Q. State to the jury, Mr. Lambert, where you saw them and under what circumstances?

Mr. Boochever: Object to this again, Your Honor, as improper redirect examination.

Mr. Bell: This is redirect.

The Witness: Read the question.

(Previous two questions read.)

The Court: What relation—can I ask counsel for plaintiffs—has the filing of the Second Amended Complaint, whatever changes made therein as compared with other pleadings, to do with questions of this nature?

Mr. Ross: Your Honor, it has been testified to in this case by one of the witnesses—by Mr. Morgan—I believe, if I may state that, from the time—from the 24th of March until way in the fall until he saw Mr. Agostino here in town he had never seen him between that time.

The Court: Whether such testimony was given or not, if counsel says it was given, the question is proper rebuttal and the witness may answer.

The Witness: What was the date on that again, on July—

Mr. Ross: Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Your Honor, my remembrance of the testimony is different. My remembrance is he didn't remember how many [531] times he had seen him.

The Court: Overruled.

Mr. Ross: The date, Your Honor, was the 10th of July instead of the 10th of April.

The Court: Do you know what the question is now?

The Witness: Yes. We were all on the boat from Whittier to Barry Arm camp. It was Mr. Morgan and his wife and several other parties at Whittier—Mr. Agostino and myself and Mr. Gilbert, the Forest Service scaler was on there that time.

Q. (By Mr. Ross): You say they were going from Whittier over to Barry Arm camp?

A. From Whittier to Barry Arm camp, yes.

Q. Do you know how long that boat stayed over there?

A. I think only over night.

Q. Where did they go the next day?

A. Back to Whittier.

Q. Did Mr. Agostino go back on the boat with Mr. Morgan and Mrs. Morgan?

A. I believe he did. He was not at camp the next day.

Q. Were you on that boat?

Mr. Boochever: I object to that last answer as being pure hearsay and conjectural on the witness' part.

The Court: The objection is sustained. [532]

(Testimony of Kenneth D. Lambert.)

Q. (By Mr. Ross): Did Mr. Morgan and Mrs. Morgan and Agostino and yourself together with the others that you stated were on the boat when it made the trip from Whittier over to Barry Arm camp, did they shortly return to Whittier?

A. Yes, the boat returned the next day.

Q. Were you on that boat?

A. On the way up to Barry Arm I was on the boat not on the way back.

Q. Do you recall whether or not Mr. Agostino was trying to collect his money for the Barry Arm campsite on that trip or not?

Mr. Boochever: I object to that as a leading question, Your Honor.

The Court: Objection is sustained.

Q. (By Mr. Ross): Did you hear any conversation between Mr. Morgan and Mr. Agostino during that trip? A. No.

Q. Did not hear any conversation between them?

A. No.

Q. While you were employed with the Columbia Lumber Company, Mr. Lambert, down at Barry Arm camp, did the Forestry Service run any kind of lines or was there any kind of lines running in connection with the United States Forestry Service down in that area showing the people where to cut timber? [533] A. No.

Mr. Boochever: I object to the part of the question "while you were employed by the Columbia Lumber camp" as being a conclusion.

(Testimony of Kenneth D. Lambert.)

The Court: That part may be stricken.

Q. (By Mr. Ross): While you were working down at Barry Arm camp, Mr. Lambert, of your own knowledge did the United States Forestry Service follow the practice or did it not follow the practice of marking out timber sites or timber sales and putting divisions between timbers stating which timber might be merchandisable and what not be merchandisable?

A. No, they never did, that was left entirely to my dispensation which was commercial and which was not.

Q. When you started cutting timber, Mr. Blacky Lambert, down at Barry Arm camp where did you first start cutting timber?

Mr. Boochever: Object to as improper rebuttal testimony.

The Court: Objection is sustained.

Q. (By Mr. Ross): Do you recall seeing any timber at all in between a site where Agostino and Socha had cut out trees on the east side of Mosquito Creek at Barry Arm camp and the place where you started cutting timber for Columbia Lumber Company?

Mr. Boochever: Object to that question for the same reason and also for the further reason it is a leading question. [534]

The Court: Objection is sustained.

Q. (By Mr. Ross): I will ask you then, Mr. Lambert, was there any merchandisable timber



(Testimony of Kenneth D. Lambert.)

standing between Agostino's old cutting and where Columbia Lumber Company started cutting?

Mr. Boochever: Same objection.

The Court: Same ruling. The matter was covered fully in examination in chief.

Q. (By Mr. Ross): Mr. Lambert, do you recall seeing a telegram in the office of the Columbia Lumber Company at Whittier in the spring about March or April, sometime in the spring of 1948, addressed to Bruno Agostino?

Mr. Boochever: Object to that question for the same reason, Your Honor.

The Court: I do not recall whether that question was asked or not and therefore the objection is overruled.

Q. (By Mr. Ross): Answer?

A. I saw that telegram that Mr. Agostino gave me, that I took to the Columbia Lumber Company office and I left it there.

Q. Mr. Agostino gave you? A. Yes.

Q. Where did Mr. Agostino give it to you?

A. At Barry Arm. [535]

Q. Do you know about what time that was?

A. It was sometime in March.

Q. Was it 1948? A. 1948, yes.

Q. Who was the telegram from, Mr. Lambert?

A. From the Forest Service in Juneau.

Q. Did you read that telegram? A. Yes.

Q. Will you state to the jury what was in that telegram?

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Object to that as hearsay, Your Honor.

The Court: Telegram must be accounted for before any secondary evidence can be offered upon it.

Mr. Boochever: But the secondary evidence is something which someone in the Forest Service sent to Mr. Agostino. It is irrelevant and hearsay anyway whether it is in writing or oral.

The Court: Official communication upon the subject—upon anything concerning the subject of the action I think would be admissible. The objection is overruled.

Q. (By Mr. Ross): Go ahead and answer?

A. Well, the——

The Court: Don't answer. There is no proof as to where the telegram is. Mr. Agostino is here.

Q. (By Mr. Ross): Do you know what became of that telegram that was delivered to Bruno Agostino?

A. The last I saw of it was in the Columbia Lumber Company office at Whittier.

Mr. Ross: I ask you, counsel, for this telegram.

Mr. Boochever: I wish to state we have asked for all telegrams and all communications about this matter from Whittier and we have never received or been able to obtain any copy of such a telegram or any other telegram which is bearing on this case.

Q. (By Mr. Ross): Do you know where that telegram is now, Mr. Lambert?           A. No.

(Testimony of Kenneth D. Lambert.)

Q. Did you read that telegram? A. Yes.

Q. State to the jury what was in that telegram?

A. Well, it was informing Mr. Agostino that he had a continuation of his timber sale and the exact wording of it I can't remember but that was the text of it.

Q. It was a continuation of the timber sale?

A. Yes.

Q. You mean at Barry Arm?

A. At Barry Arm.

Q. And that was in March of 1948, I believe you say? A. Yes. [537]

Mr. Davis: That question, of course, is leading, Your Honor.

The Court: Yes, it is leading and the objection is sustained.

Q. (By Mr. Ross): Mr. Lambert, do you know whether or not Mr. Agostino in his timber cutting down at Barry Arm camp cut all the merchandisable timber—the tracts on which he cut timber?

Mr. Davis: Your Honor, if I remember correctly that same question was asked him in the case in chief. He answered the question fully. I don't believe it is proper at this time.

The Court: Objection is sustained upon that ground.

Mr. Ross: I don't recall, Your Honor, that specific question being asked if he cut all the timber.

The Court: I think it was asked and answered and asked several times by counsel and answered

(Testimony of Kenneth D. Lambert.)

several times also by counsel, perhaps, on both sides.

Q. (By Mr. Ross): Mr. Lambert, have you ever had any experience in appraising, inspecting and appraising, the value of machinery such as was found at Barry Arm camp when the Columbia Lumber Company started its operation there?

Mr. Boochever: Objection on the same ground—it was all gone into with him on the original case.

The Court: Not fully so. The objection is overruled and [538] the witness may answer. I think the witness qualified at that time but this is a preliminary question and may be asked again. You may answer, sir.

The Witness: Yes, I worked for the Government as an inspector and appraiser on surplus property in Seattle.

Q. (By Mr. Ross): Well, while you were working for the Government as an appraiser did you ever inspect any such equipment as caterpillar tractors and donkeys and sawmill equipment?

A. Everything but sawmill equipment. I am not qualified on sawmill equipment at all.

Q. You did inspect or did you inspect and appraise caterpillar tractors?

A. Yes, all logging equipment—caterpillars, donkeys.

Q. Mr. Lambert, I will ask you a purely hypothetical question, now we will assume that Mr. Agostino had and Socha had 250,000 feet of standing timber down at Barry Arm camp, what would

(Testimony of Kenneth D. Lambert.)

that timber be worth to Mr. Agostino and Socha?

Mr. Boochever: I object to that, Your Honor. In the first place he doesn't know what anything is worth to Mr. Socha and Mr. Agostino and I object. The second place, it was covered in redirect in regard to that timber.

The Court: The question is not rightly put, I think. The question is—what its value is and what its value is as to Agostino and Socha. [539]

Mr. Boochever: The point I am making, no one can know what the value was to Agostino and Socha other than Agostino and Socha.

The Court: That is quite right; objection is well taken on that ground.

Q. (By Mr. Ross): Did you know the value of timber standing at Barry Arm camp in March, 1948, Mr. Lambert?

A. Know the value of it standing?

Q. Yes.

A. Well, I don't know what stumpage they paid for it.

Q. Well, we will assume that they paid one dollar a thousand stumpage.

A. One dollar a thousand stumpage, you mean what the timber would be worth to Mr. Agostino and Mr. Socha?

Q. What the value of the timber would be worth there, we will say, logged and in the pond?

Mr. Boochever: Object to that as being totally irrelevant.

(Testimony of Kenneth D. Lambert.)

The Court: That is a preliminary question.  
Overruled.

Mr. Boochever: And the further reason that he testified to that very same question on direct examination.

The Court: He may have, I do not distinctly recall just what the testimony was on that point. You may answer the question.

The Witness: Well, that would be very hard to determine [540] just what the timber was worth to him. It would depend on his method of logging and how much labor he hired to take the timber out. If they did the work themselves and took it out on a small scale then their margin of profit would be much greater.

Q. (By Mr. Ross): As Agostino and Socha were equipped to handle timber what would have been the value of that timber placed in the pond if it had to be gotten out with the equipment that they had there at the time?

A. Well, at their price that they were receiving they should have made around six or eight dollars a thousand profit on it.

Q. On the 250,000 feet that we assume?

A. Yes.

Q. Did you ever make a close examination or inspection of the bunkhouse at Barry Arm camp that was owned by Agostino and Socha?

Mr. Boochever: Objection, Your Honor, same grounds—improper rebuttal testimony.



(Testimony of Kenneth D. Lambert.)

The Court: The plaintiff has been permitted to reopen his case for the purpose of giving further testimony as to values in view of the filing of the Second Amended Complaint and that is the only reason why this testimony is being permitted. Objection is overruled and exception will be noted.

Q. (By Mr. Ross): Did you inspect that house, we will say, the bunkhouse [541] and the cookhouse? A. Yes, I did.

Q. Will you tell the jury how that building is put up, how it is constructed, whether it is a frame building or whether it a brick building or what it is, and tell the jury thoroughly in your own words how that building is put up and something about its size?

Mr. Boocvhever: Your Honor, I make the same objection. He testified on that exact point on his direct testimony; regardless of whether there is a new basis for testimony he gave this exact testimony before.

Mr. Ross: Your Honor, his testimony, I think, will contradict their testimony it was merely a frame building and there is no testimony of his going inside and inspecting the house, the walls and anything and the type of structure it is.

The Court: I do not recall testimony as to the type of structure. The objection is overruled.

Mr. Ross: And I don't believe value was ever placed on it, either.

The Witness: It is a log building and it is all

(Testimony of Kenneth D. Lambert.)

hewed inside and I think there are six rooms in it, stove, bathroom, and mattresses n there, and cots and it is a very good building.

Q. (By Mr. Ross): You say the logs are hewed inside? Explain what you mean by that? [542]

A. When they built the building they peeled the logs and then on the inside they hewed it just as smooth as a wall—very good log house, well constructed, in fact it is one of the best ones I have ever seen built.

Q. And you have had occasion many times, have you not, to inspect log houses and buildings of camp equipment at various places in the country, or have you?

Mr. Boochever: Object to that as leading.

The Court: Overruled.

The Witness: I have.

Q. (By Mr. Ross): What would you estimate the value of the bunkhouse and the cookhouse of Agostino and Socha at Barry Arm Camp?

Mr. Boochever: Object to that as no proper foundation.

The Court: Overruled.

Q. (By Mr. Ross): Value down there?

A. Well, I will say it couldn't be built for \$10,000.00.

Q. Then what would you say the value would be of that building at Barry Arm camp?

A. Well, it would still be worth \$10,000.00 if you had to build it there.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Object to that answer and move that it be stricken as not being responsive to the question.

The Court: Overruled. [543]

Q. (By Mr. Ross): After you went to work for Columbia Lumber Company, Mr. Lambert, did you ever use the pond that was used by Agostino and Socha for booming logs together?

Mr. Boochever: Object to the portion of the question which states "after you went to work for the Columbia Lumber Company" as improper.

The Court: Well, "to go to work for" doesn't necessarily mean employment. The question may be "after you began to take on logs to be sold or delivered or given to the Columbia Lumber Company, then did you use——?"

The Witness: Yes, we used the pond.

Q. (By Mr. Ross): State to the jury how you used the pond, Mr. Lambert, and how much timber that you placed in the pond and so forth in your own words just state to the jury?

A. We used the pond for about two rafts which was approximately 200 and 250-thousand board feet and after that the pond was not practical to us any more so we discontinued its use. The pile driver came up from Whittier and we drove piling in the main channel of the river and rafted our logs there.

Q. Why wasn't the pond used after that, state just why it wasn't used?

A. Well, the timber was further on up the river

(Testimony of Kenneth D. Lambert.)

and we had a new dumping ground for our logs where we dumped right into the [544] river and we floated them down to where we rafted them.

Q. While you and Mr. Morgan and Mr. Agostino, Mr. Rowell, were sitting down there at Barry Arm camp on the log discussing—carrying on a discussion about April 10, 1948, was anything said about any small cabin? A. Yes, it was.

Q. State to the jury what was said about that small cabin?

Mr. Boochever: Your Honor, that same question was asked a few minutes ago. It was objected to and the objection was sustained.

Mr. Bell: Your Honor, it wasn't brought out on the defense testimony that there was a controversy when Mr. Butcher testified about a controversy over a little log cabin that Bruno called his own.

The Court: My recollection is there was testimony about a little cabin in the case in chief and for that reason the objection is sustained.

Mr. Bell: Exception. We want to make an offer of proof. We offer to prove by this witness if he were permitted to testify that he was sitting on the log with Bruno Agostino and Ted Rowell and Mr. Morgan at Barry Arm camp on the 10th day of April, 1948 and he heard a conversation between Mr. Morgan and Mr. Agostino in which a little cabin that is referred to as Bruno's little cabin, not the cookhouse or the garage or any of the larger

(Testimony of Kenneth D. Lambert.)

buildings but just a little cabin that Bruno's [545] clothes are in, and in that conversation Bruno asked Mr. Morgan if he wanted that cabin too and Mr. Morgan said "No, you can have that, I don't care anything about that."

Mr. Boochever: We must repeat the objection that this witness testified in regard to that very conversation and told what he knew about the conversation at the time and it is nothing new to be added on that score now.

Mr. Bell: Before Your Honor rules, we want to call your attention to the fact that this little cabin proposition first came out in the testimony of Mr. Butcher in which he said that Bruno objected to giving them this little cabin, and this is——

The Court: My impression is I can't remember all of the testimony—my impression is that there was some testimony about it. I don't remember whether this Mr. Lambert was asked about it.

Mr. Boochever: Your Honor, I believe I further wish to point out this testimony, if it did happen, happened on April 10th and would be totally irrelevant to vary a written contract entered into on June 29th or thereabouts.

The Court: That objection, in my judgment, is not well taken. I think I will admit the evidence upon the theory I am not certain what the testimony was.

The question may be answered.

Q. (By Mr. Ross): Please state what——[546]

(Testimony of Kenneth D. Lambert.)

A. Yes, there was an understanding that Mr. Agostino could keep that little cabin that it was no use to the Columbia Lumber Company or us whatsoever.

Mr. Davis: Now, Your Honor, I would move that the answer be stricken on two grounds—in the first place it is apparent from the testimony that there wasn't any agreement reached at any time there. In the second place there was a written agreement made at a later time including all the property and equipment.

The Court: Motion is denied.

Q. (By Mr. Ross): While you were working down at Barry Arm Camp for Columbia Lumber Company, as you have testified before, were you ever instructed by the Columbia Lumber Company—by Mr. Morgan to return any equipment that you might have used that belonged to Agostino and Socha at the time the Columbia Lumber Company started its operations at Barry Arm camp?

Mr. Boochever: Your Honor, I hesitate to object again, but counsel insists on putting in "while you were working for Columbia Lumber Company" in each one of his questions, and, of course that is not the truth in the matter and not the case and I object to that portion of the question.

The Court: Will counsel rephrase his question and leave out the objected to phrase? [547]

Q. (By Mr. Ross): While you were working at Barry Arm camp, Mr. Lambert, were you ever



(Testimony of Kenneth D. Lambert.)

instructed by Mr. Morgan—Thomas Morgan here or the Columbia Lumber Company to return any equipment that you had used that belonged to Mr. Agostino and Mr. Socha that they used there in connection with their operations?

Mr. Boochever: Your Honor, I object to that as leading. There is no testimony that he ever used any equipment of Mr. Agostino or Mr. Socha much less that he returned.

Mr. Ross: There is plenty of testimony in this case, Your Honor, that he used six barrels of oil and a barrel and one-half of gasoline.

The Court: Objection is overruled; you may answer.

The Witness: No, there never was anything said about returning it at all. I mailed a credit memo to the Columbia Lumber office crediting Mr. Agostino with six barrels of diesel oil and a barrel and one-half of gasoline and that is all I used of his.

Q. (By Mr. Ross): Did you ever return any of that equipment? A. No.

Mr. Davis: Now, Your Honor, I wonder if it wouldn't be wise at this time to instruct the jury that Mr. Lambert at the time he used this diesel oil and gasoline was acting as an independent contractor and that his actions do not bind Columbia Lumber in any way.

The Court: Motion is denied at this time. The subject [548] will be covered generally in the written instructions.

(Testimony of Kenneth D. Lambert.)

Q. (By Mr. Ross): All right. At the time you made your settlement with Columbia Lumber Company for your term of employment down at Barry Arm camp were you charged with the equipment that you used—this six barrels of oil and barrel and one-half of gasoline that you have just testified to—were you charged up with that?

A. Well, it was charged indirectly to the camp but the Columbia Lumber Company assumed all obligations of the Camp One operations.

Mr. Boochever: I must object to that answer there as a conclusion of law.

The Court: Overruled.

Q. (By Mr. Ross): Mr. Lambert, do you know the value of the oil that was taken from Socha and Agostino's camp per barrel?

A. No, I don't remember the prices of it right now.

Q. Do you know the value of the gasoline?

A. No, I don't remember what the price was.

Q. Did you ever inspect the garage there at Barry Arm camp that belonged to Socha and Agostino?

A. Yes, I did.

Q. Will you tell the jury how that building is constructed?

A. Well, it was a frame building with benches and bins in [549] there for racks for tools, there was a nice little shop more or less fixed up like a garage. There was a forge in there, drill press.

Q. How big was that building, Mr. Lambert?

(Testimony of Kenneth D. Lambert.)

A. I don't know just how big it was. It was fairly good size though.

Q. You say it was a frame building?

A. Yes.

Q. What would you estimate the value of that building to be at Barry Arm camp?

Mr. Boochever: Object to that as no proper foundation.

The Court: Overruled. You may answer.

The Witness: Oh, I would say \$2,000.00 anyway.

Q. (By Mr. Ross): Did Columbia Lumber Company store equipment there at the cookhouse and the bunkhouse or the garage after they commenced their operations at Barry Arm camp?

Mr. Davis: If the Court please, the identical question was asked him on his case in chief and he answered he did not.

The Court: The objection is sustained.

Mr. Ross: I think the question was asked Mr. Morgan, all right, Your Honor, but never asked—

The Court: It was asked this very witness as I recall it.

Mr. Ross: That is all. [550]

The Court: Counsel for defendant may examine.

### Further Recross Examination

By Mr. Boochever:

Q. In regard to the value of the house and also the garage that you just mentioned, that would not have much value to an outfit that was already

(Testimony of Kenneth D. Lambert.)

equipped with everything they needed there, would it?

A. No, it wouldn't have much value to them unless they needed it.

Q. Now, did Tom Morgan or anyone in power at Columbia Lumber Company ever tell you that you could use Bruno's equipment there?

A. No,—

Q. Did they ever tell you—pardon me.

A. I will have to retract. Mr. Morgan told me I could use that equipment. That was at the time I terminated with the Columbia Lumber Company.

Q. But prior to that time had he ever told you that?      A. No.

Q. In fact he told you just the opposite?

A. That is right.

Q. And the borrowing of those barrels of oil was done on your own, isn't that right?

A. Yes.

Q. Entirely so?      A. Yes. [551]

Mr. Boochever: No further questions, Your Honor.

The Court: That is all.

#### Further Redirect Examination

By Mr. Ross:

Q. Did you report taking the six barrels of oil and the one and one-half of gasoline to the Columbia Lumber Company, Mr. Lambert?

A. Yes.

(Testimony of Kenneth D. Lambert.)

Mr. Boochever: Your Honor, there is one question I meant to ask the witness before this.

The Court: Counsel may ask it now.

#### Further Recross-Examination

By Mr. Boochever:

Q. Now, you spoke about a conversation of April 10th in which some mention was made of a small cabin, Mr. Lambert? A. Yes.

Q. Was any agreement reached in regard to the sale of that property at that time? A. No.

Mr. Boochever: That is all, Your Honor.

#### Further Redirect Examination

By Mr. Ross:

Q. Now, that property, Mr. Lambert, when you state that do you mean just that cabin or do you mean the agreement about the whole Barry Arm campsite? [552]

A. The whole Barry Arm campsite including all material that was there, all equipment.

#### Further Recross-Examination

By Mr. Boochever:

Q. Was any sale made at that time of the Barry Arm camp? A. No.

Q. Was any made prior to the date when you were there? A. Not to my knowledge.

Mr. Boochever: That is all, Your Honor.

The Court: That is all, Mr. Lambert, you may step down.

(Testimony of Kenneth D. Lambert.)

Mr. Ross: I would like to ask one more question, Your Honor.

The Court: Very well.

#### Further Redirect Examination

By Mr. Ross:

Q. Mr. Lambert, would you have ever moved into Barry Arm camp with Columbia Lumber Company camping equipment if you had not received the permission of Agostino to move in?

Mr. Boochever: I object to that question as being improper recross examination now.

The Court: Overruled, you may answer.

The Witness: No, I never would. I wouldn't have moved in there without Bruno's permission at all.

Q. And at the time you moved in there, Mr. Lambert, was it your understanding or was it not that the Columbia Lumber [553] Company was buying Socha and Agostino out?

Mr. Boochever: Object to that as being leading and improper.

The Court: Objection is sustained.

Mr. Ross: That is all.

Mr. Boochever: That is all.

The Court: That is all, Mr. Lambert.

#### BRUNO AGOSTINO

called as a witness herein, having previously been duly sworn, resumed the stand and testified as follows:



(Testimony of Bruno Agostino.)

Further Redirect Examination

By Mr. Bell:

Q. You are the Bruno Agostino who testified before in this case, are you not? A. Yes, sir.

Q. Bruno, you heard Mr. Morgan testify, did you not? A. Yes.

Q. You heard him testify he couldn't find you from the time he left you down there in April 10th?

A. Yes.

Mr. Boochever: I object on that, Your Honor, as incorrect, the statement of counsel is incorrect.

Q. (By Mr. Bell): All right, did you hear him testify to this or in this substance "That he never could find you after the time he left [554] you down there? A. I did.

Mr. Boochever: Your Honor, I object to that as improper redirect examination and what he heard a witness say on this stand is totally immaterial and has nothing to do with the issues right now he is trying to prove.

The Court: Overruled.

Q. (By Mr. Bell): Now, Mr. Agostino, did you see him on the 10th day of July, 1948?

A. Yes, I was in his office.

Q. Where did you see him, where was his office?

A. Whittier.

Q. What was the purpose of your visit there?

Mr. Boochever: Object to what the purpose of the visit was, Your Honor.

(Testimony of Bruno Agostino.)

The Court: Unless it is connected with this present action or the subject matter of it.

Mr. Bell: It, of course, would be connected with this.

The Court: Overruled, you may answer.

The Witness: When I was going to Barry Arm to get some of my stuff back and I went to Mr. Morgan in the office and Mr. Jacobson.

Mr. Bell: Your Honor, I wonder if we could ask the witness to slow down a little. [555]

The Court: Speak more slowly, Mr. Agostino.

Q. (By Mr. Bell): Did you talk to him at Whittier? A. Yes.

Q. Did you leave there and ride with him on a boat? A. Yes.

Mr. Boochever: Object to this as a leading question.

The Court: Sustained.

Mr. Bell: All right, I will take up all the time that is needed.

Mr. Boochever: Objection.

The Court: Objection is sustained.

Q. (By Mr. Bell): Mr. Agostino, after you left Whittier where did you go?

A. To Barry Arm.

Q. Who went with you?

A. Mr. Morgan and his wife and Mr. Lambert and two or three other people, I don't remember who they are—their names.

Q. How did you go? A. By the boat.

(Testimony of Bruno Agostino.)

Q. How long did it take you to go?

A. It take about 3 hours.

Q. And how long did you stay at Barry Arm?

A. Well, I stay only half day and I was going to stay there but I talked to Mr. Morgan and I asked him if that deal is [556] going to go through and he said "Yes, yes, that is a deal, you come to town and we settle".

Q. And then did you come back on the boat or not?

A. I come back on the boat with Mr. Morgan but I never saw Mr. Morgan after I left Whittier.

Q. Please tell the last time you talked to him on the trip, where were you?           A. Whittier.

Q. In Whittier?           A. Yes.

Q. And where did you go then after you left Whittier?           A. I came here to Anchorage.

Q. And then did he come to Anchorage?

A. Well, he might have come but I never saw it. I waited down at Mr.—to the Columbia office—Lumber office down here, I forget his name, he told me to wait one-hour and I did wait one-hour and he never come back.

Q. Did you ever see Mr. Morgan any more until the trial of this case started?

A. No more, that was the first time I seen him.

Q. Mr. Agostino, did you ever see the letter that Mr. Butcher identified here or was introduced by the defense in this case?

Mr. Davis: Your Honor, the same question was

(Testimony of Bruno Agostino.)

asked; witness answered he did not on the case in chief; it is improper at this time to go into that again. [557]

Mr. Bell: He was asked by cross-examination if he didn't see a certain letter and he said he didn't but now Mr. Butcher has made it competent.

Mr. Boochever: I don't know what difference it makes. He has testified to that same question before.

The Court: It is—the letter was not in evidence at that time?

Mr. Boochever: It was introduced in identification and it was shown to this same witness and he was——

The Court: Were you shown that letter when you were on the stand before?

The Witness: I never see this letter before only here in Court.

The Court: When you were on the witness stand before did you see the letter?

The Witness: I think I did, the same letter.

The Court: The objection is sustained then. He has already replied on it.

Q. (By Mr. Bell): Did Mr. Butcher ever tell you anything about receiving that letter?

A. No.

Mr. Boochever: Object to that, Your Honor. same reason—this has been gone over before.

The Court: Objection sustained. [558]

(Testimony of Bruno Agostino.)

Mr. Boochever: And move that the answer be stricken.

The Court: Answer stricken.

Q. (By Mr. Bell): Did Mr. Butcher at any time discuss the receipt of that letter or the contents of it with you? A. Never.

Mr. Boochever: Same objection, Your Honor.

The Court: Same ruling.

Mr. Bell: Exception.

The Court: Counsel has proceeded far enough with that.

Q. (By Mr. Bell): Did you ever know or were you ever requested to furnish an itemized statement of that equipment down there?

Mr. Boochever: That also has been gone into, Your Honor.

The Court: I do not recall that. What is the answer?

The Witness: They never asked me. Mr. Morgan, they say the contract is good enough. They don't need any itemized statement because he knows what was in the camp.

Q. (By Mr. Bell): Where were you at the time Mr. Morgan told you that?

A. Right in Mr. Butcher's office.

Mr. Davis: Now, Your Honor, not only was the same question asked but the same answer was made.

The Court: It may have been given but I do not recall that question or that answer. Overruled.

Q. (By Mr. Bell): Mr. Agostino, what did you

(Testimony of Bruno Agostino.)

pay for the sawmill that was there on the bank at Mosquito Creek?

Mr. Boochever: Your Honor, object to that as being immaterial unless it is shown when and what went on in the meantime and in addition it was gone over on direct examination as to what he evaluated——

Mr. Bell: That was one of the things I asked permission to reopen to prove.

The Court: Overruled.

The Witness: \$1950.00.

Q. (By Mr. Bell): And where was it when you bought it?

A. Down what they call Irish Cove. It is below Ellamar about ten or twelve miles.

Q. How did you get it from Irish Cove to your place?

A. Well, we got the scow and we got the Jim Dolan to go there and load it and bring it up to Barry Arm.

Q. Now, after you got it there what did you do with it?

A. Well, we set it up, put up a foundation and it was ready to saw with a belt. I needed a belt, that is all.

Q. Now, then, was it worth as much or more or less when you turned it over to the defendant in this case?

Mr. Boochever: Object to that as a leading question.



(Testimony of Bruno Agostino.)

The Court: Sustained. [560]

Q. (By Mr. Bell): Do you know what its value was at the time you turned the property over to the Columbia Lumber Company?

Mr. Boochever: Same objection, Your Honor.

The Court: The first part is a legitimate question. The question whether he did turn it over to the Columbia Lumber Company, that is up to the jury to decide.

Mr. Bell: That is right, but he has contended and has so testified that he turned it over to them.

The Court: You may answer.

The Witness: It should be worth \$1950.00 if not worth any more.

Q. (By Mr. Bell): How much work did you do on it?

A. We worked three men pretty near a month putting in foundations 150 feet long and 30 feet wide.

Q. And how long did you work the three men?

A. About, over 30 days.

Q. Now, Mr. Agostino, what would you ordinarily make in profit on the cutting of 250,000 feet, board measure, of timber like you had standing there in March at the time you quit cutting or left it to them, what would you have made in net profit basing it upon your previous experience?

Mr. Davis: Your Honor, net profit hasn't any bearing on this case at all. I think the question is improper. [161]

(Testimony of Bruno Agostino.)

The Court: Overruled. You may answer.

The Witness: I just tell you the figure what we make before. We had three men, we made \$9,000.00 in three months and one-half. Now, I don't figure what we would make a day.

Mr. Davis: Your Honor, that answer isn't responsive to the question at all.

Q. (By Mr. Bell): I will change the question then. How much did it cost you per thousand feet to cut logs and put them in the water?

A. Well, I don't figure what it would cost just 1,000 feet to put it over. I go with the cat and haul on the logs and pull them right up in water at one time and it don't take an hour to knock down a tree two or three thousand feet. We make \$10.00 a day clear on a thousand feet.

Q. Now, what were you getting for logs in the water at Mosquito Creek per thousand feet?

A. Well, I would say we make \$10.00 a thousand.

Q. \$10.00 a thousand profit? A. Yes.

Q. And you had 250,000 feet of lumber purchased there?

Mr. Boochever: I object to that as leading, Your Honor.

The Court: Overruled.

Q. (By Mr. Bell): Mr. Agostino, where was your timber—this 250,000-feet of board measure timber that you had bought with reference to [562] your camp house?

(Testimony of Bruno Agostino.)

Mr. Boochever: Your Honor, I object to this as being improper rebuttal testimony.

The Court: Objection sustained.

Mr. Bell: Your Honor, it was testified by Mr. Morgan that it was south of his house and he has never fixed the direction in it.

The Court: This witness told about it upon his case in chief as to where the timber was.

Mr. Bell: Your Honor, maybe you could tell me where it was. I couldn't attach it.

The Court: Counsel knows that question isn't proper.

Q. (By Mr. Bell): All right, then. Mr. Agostino, tell us whether it was south or north of your house?

Mr. Boochever: I object to that, Your Honor, same objection. It is the same question again.

The Court: I think it is, too. You may answer.

The Witness: It is northwest of my house.

Q. (By Mr. Bell): Now, Mr. Agostino, were you there after they started—after Lambert started cutting timber, were you there around the place when Lambert started cutting timber?

A. Yes.

Q. Where did he start cutting timber with reference to your [563] house?

Mr. Boochever: I object to that as being—

The Court: That has all been gone into. The objection is sustained. Counsel will desist from further examination on matters that have been gone

(Testimony of Bruno Agostino.)

over in chief. This case is reopened to give additional proof as to values.

Q. (By Mr. Bell): Bruno, what would you say or do you know the value of the cookhouse and bunkhouse that you and your partner had built there at Barry Arm?

Mr. Davis: Your Honor, I object. I believe that the same question was asked and the question was answered somewhere in the neighborhood of somewhere near three or four-thousand dollars on direct examination.

Mr. Bell: He said they spent that much on lumber.

The Court: Objection is overruled.

Mr. Davis: Not lumber—logs.

The Witness: Well, I said the last time that if it was in Anchorage it would be worth \$30,000 or \$35,000.

Mr. Boochever: The witness himself is repeating just what he said last time on this question.

The Court: The answer may be stricken because what it is worth in Anchorage is no indication as to what it was worth on Barry Arm. It may be worth a million dollars here.

The Witness: In Barry Arm I think it was worth anyway [564] then \$5,000.

Q. (By Mr. Bell): What would the garage be worth there at Barry Arm?

A. Garage worth about a thousand dollars because we pay \$800 for just lumber without the labor

(Testimony of Bruno Agostino.)

to build it.

Q. And you paid that money to the Columbia Lumber?

A. Yes, I consider a thousand dollars anyway.

Q. Bruno, there has been some testimony here that one of your cats was in salt water once, will you please tell the jury when that was?

A. Well, it was in salt water for about 40-hour and we take it out and wash them with cold—with some solvent solution, and we never notice that the cat be in salt water. It work right along and use it as before.

Q. About what date was that, Bruno?

A. That was—if I remember—it was around in first of May, second of May.

Q. In what year?           A. 1945.

Q. 1945?           A. Yes.

Q. And you have used it constantly from that time up to the time you left?

Mr. Boochever: Object to that as leading, Your Honor.

The Court: Objection is sustained. [565]

Mr. Boochever: And move that the answer be stricken.

The Court: Answer may be stricken.

Q. (By Mr. Bell): Had you used it up right along up to the time you sold it?           A. Yes.

Q. Was it in working order in March of 1948?

A. Yes, in good order.

(Testimony of Bruno Agostino.)

Q. And what about the RD-7, was it in good order or poor order?

A. RD-7 on May, 1947 Mr. Morgan saw that cat working in the pond. He saw it in his own eye it is in very good shape.

Q. I will ask you whether or not there was any blades on these cats?

A. Yes, there was a blade on the D-8.

Q. Blade on the D-8?           A. Yes.

Q. Was that a home-made blade or was that the one that came with the cat?

A. That came from the factory with the cat.

Q. Did that blade have any kind of hoist for it?

A. It had two hoists that is for logging and they have a hoist for the—not a hoist—for the plow—for the blade.

Q. Now, Mr. Agostino, did you see in late August or early September those particular cats when you were down there?

A. Yes, I seen them working. [566]

Q. And where were they working?

Mr. Boochever: Your Honor, I object to this. He has gone over this exact same thing before on his direct case—identical question, identical answer.

The Court: Objection is sustained.

Mr. Bell: Exception. Your Honor, it has been testified that they didn't work. I don't remember if he testified he saw them working—All right, I will—just give me an exception, please.



(Testimony of Bruno Agostino.)

Q. When you did take those pictures down there were the cats operating that day?

Mr. Boochever: I object to that as being too indefinite. He took pictures on two different occasions and moreover he went into that on his direct case.

The Court: That was not answered, if I recall.

Q. (By Mr. Bell): On August 30th or September 1st or along about that date when you took the small pictures which were introduced here, were the caterpillars in operation at that time?

A. I went up to Barry Arm because they told me——

The Court: Answer the question.

Q. (By Mr. Bell): Were they operating?

A. Up Columbia camp, up the Columbia camp up above Barry Arm. [567]

Q. They were up at Columbia camp?

A. Yes.

Q. Were they operating up there?

A. Up at the camp up there.

Q. They were? Now, did you see the caterpillars in action that day?

A. I see one cat coming home. I never went where he was working.

Q. How far away was it when you first saw it?

A. It was right there in the camp just about 20 or 30 feet.

Q. Where did it stop?

A. Stopped right on that camp—on the Columbia camp.

(Testimony of Bruno Agostino.)

Q. You say it was coming in from where it was working; please tell where it was working?

A. Come in from up above from the camp which was farther north, coming down to the camp.

Q. Do I understand that the cat was coming from the woods to the camp?

A. To the camp, yes.

Q. And you saw it at that time?

A. Yes. You don't understand that?

Q. Yes. I am sorry, Bruno. Was it operating normally at that time?

A. Well, I didn't see it working, I see him coming home. I suppose it was in good order. [568]

Q. When it was coming home was it running on its own power?

A. Yes, sir, you no can drag it.

Q. What cat was that? A. It was the D-7.

Q. Now, did it have an arch on it at that time? A. That was on D-8.

Q. Well, what kind of an arch was on the D-8 at that time?

A. That is an arch, that is all I can tell, it is an arch to haul the log, hang up four or five logs, six or seven, whatever they want and that is to keep them off the ground and drag them out wherever the pond is.

Q. And that arch was on the D-8? A. Yes.

Q. Did you have any arch on that D-8 when you turned it over down there? A. No.

(Testimony of Bruno Agostino.)

Q. Was the arch attached to the cat at the time you saw it?           A. Yes.

Q. Was it in a position that it could be worked for handling logs?           A. Of course it could.

The Court: Court will stand in recess until 3:47.

(Short recess.)

The Court: The record will show all members of the jury present without exception from counsel.

Q. (By Mr. Bell): Bruno, you heard Mr. Butcher testify here yesterday?

Mr. Boochever: Your Honor, I believe I had started to examine the witness.

Mr. Bell: I didn't know you had started at all. I asked him a question and was conversing with Mr. Ross.

Mr. Boochever: Possibly I am mistaken in that. I don't mean to be rude but I didn't intend to stop him.

The Witness: Yes.

Q. (By Mr. Bell): Why did you leave Mr. Butcher and go to Mr. Ross as attorney?

Mr. Boochever: Object to that as immaterial what his reasons are.

The Court: Objection sustained.

Mr. Bell: Exception.

Q. Did Mr. Butcher do the things you asked him to do in regard to this case?

Mr. Boochever: Object to that, Your Honor.

The Court: Objection is sustained.

Q. (By Mr. Bell): What time did you go to

(Testimony of Bruno Agostino.)

Mr. Ross or approximately what time of the year did you go to Mr. Ross?

A. Well, that must have been around the 1st of August, first of August—last of July, I never keep a date. [570]

Q. Mr. Butcher has not been your attorney since that time, do you mean? A. No.

Q. And is he your attorney now in any way?

A. Mr. Herman Ross and you.

Q. Bruno, you know the Ellamar Packing Company people—Mr. Brown? A. What?

Q. Do you know Mr. Brown of the Ellamar Packing Company? A. Yes.

Q. Do you know what position Mr. Brown holds with the Ellamar Packing Company?

A. He is Vice President of the Company.

Mr. Boochever: I object to that, Your Honor, unless he shows how he knows it in some proper manner.

The Court: Overruled.

Q. (By Mr. Bell): Do you owe the Ellamar Packing Company anything on that D-8 caterpillar tractor?

Mr. Boochever: Object to that question as being a self-serving statement.

The Court: Overruled, you may answer.

The Witness: No, I consider that he owe us money and I call him attention—

The Court: Never mind, you have answered.

Q. (By Mr. Bell): Did you have a conversa-

(Testimony of Bruno Agostino.)

tion with Mr. Brown down at Barry Arm in 1946?

A. 1947, 8th of June.

Q. And where was that conversation?

A. Right in Barry Arm.

Q. Was it about this RD-8 caterpillar tractor?

Mr. Boochever: Object to that question as leading, Your Honor.

The Court: Overruled.

The Witness: Yes.

Mr. Boochever: I think it is leading.

The Court: It is leading unquestionably but I think the asking of a leading question is not harmful and may save a bit of time under these circumstances.

Q. (By Mr. Bell): Bruno, what did you pay for that altogether for that RD-8 caterpillar?

A. Well, we pay \$4,000 in cash and we gave him 55,000 feet—they take away to the mill and 115,000 feet piling that has been lost and that was the argument that he no receive the piling.

Q. Bruno, did you notify him that you had the 115,000 board feet of logs in the pond for him?

A. Yes, we did, we had that in three different times.

Q. And did he ever come and get them? [572]

A. No.

Q. Were they lost in a storm?

A. They were lost there in front of the camp—big storm coming break the cable and they went.

Q. How long was it after you had notified him

(Testimony of Bruno Agostino.)

to come and get them that the cable broke there?

A. Well, we notify him that is 1945, 1944 and 1946, that is the last time. I wrote three letters and I never get the answer. We lost 70,000 feet.

Q. And they were tied up there for him all during that time? A. Correct.

Q. Now, then, did you have a controversy with him about that caterpillar whether you owed him or he owed you in over-payment? A. Yes.

Q. Did you both threaten to sue?

A. Yes, we——

Mr. Boochever: I object to that—what he threatened to do is hearsay and threats are immaterial.

The Court: Not hearsay. Overruled.

Mr. Davis: Hearsay as far as we are concerned.

Mr. Boochever: What any third party threatened to Mr. Agostino would certainly be hearsay, Your Honor.

The Court: Overruled upon that ground.

Mr. Boochever: We also object on the ground it is immaterial, irrelevant and incompetent. [573]

The Court: Upon that ground it is sustained.

Q. (By Mr. Bell): Mr. Agostino, then, have you filed a suit against him in this Court that the Gentlemen for the defendant offered part of it in evidence here? Did you file that suit or cause it to be filed? A. I think so.

Q. And that suit is now pending, is it?

A. Yes, sir.

Q. I believe there has been introduced in evi-



(Testimony of Bruno Agostino.)

dence here something about a suit that you filed against Ray Grasser in 1947, and I will ask you tell the jury what that suit is about?

Mr. Boochever: I object to him, Your Honor——

Mr. Bell: You introduced it.

Mr. Boochever: The complaint speaks for itself in that respect.

The Court: Objection is sustained. We cannot try these other suits in this action.

Mr. Bell: It is liable to prejudice the jury by not having it explained since part of it is introduced, Your Honor?

The Court: The complaint is in and it went in without objection.

Q. (By Mr. Bell): You do owe Ray Grasser some money, do you? A. Yes. [574]

Q. And have you ever disputed the fact that you owe him some to anybody? A. Yes.

Q. And why is it that you refuse to pay him that money?

A. I never refuse to pay him.

Mr. Boochever: Object as immaterial, irrelevant and incompetent why he refuses to pay Mr. Grasser money.

The Court: Overruled.

Q. (By Mr. Bell): Now you may state?

A. I never refuse to pay.

Q. Now, then, I will ask you if that \$3300.00 that is mentioned in the contract and the check

(Testimony of Bruno Agostino.)

which was shown here in evidence was for the purpose of settling with Ray Grasser?

A. Correct.

Q. Now, then, did he have any right or bill of sale or mortgage or anything like that on your donkey engine and the other caterpillar down there?

A. No right, whatever.

Mr. Boochever: Object, that asks for a conclusion of law as to whether he had any right.

The Court: Overruled.

Q. (By Mr. Bell): And did you give him any permission to go down there and take any of that equipment? [575]

A. No permit.

Q. Did you even know that he had taken it until Mr. Morgan testified to it?

A. Correct.

Mr. Bell: You may take the witness.

#### Further Recross-Examination

Br. Mr. Boochever:

Q. You knew that Ellamar Packing Company was claiming that you owed them money on their tractor, didn't you?

A. No, sir.

Q. Well, now, you have a complaint that you have filed against them, isn't that right?

A. I have filed for the bill of sale.

Q. They have never given you a bill of sale for it, had they?

A. No, trial is not through yet, I don't know.

Q. You have never gotten the title to it?

A. Not it quite.

(Testimony of Bruno Agostino.)

Q. Did you ever tell Mr. Morgan that you did not have the title to it?      A. No.

Q. What was your answer?

A. I said "No" because he never ask me.

Q. But you never told him that?

A. He never asked me. I considered that it was paid.

Q. Now, you testified—I would like to show you a picture [576] here, it is Plaintiff's Exhibit 25, and ask you what that picture purports to show?

A. That is the garage.

Q. And is that your caterpillar tractor?

A. Why, sure, that is my cat, and this is the donkey right there.

Q. And is that the D-8 tractor?

A. That is D-8 tractor in here.

Q. The D-8?

A. D-8 right there. That is all black. You can only see that. The other picture show the other cat in front.

The Court: Is that the D-7?

The Witness: D-8 in here and the other cat is inside.

Q. (By Mr. Boochever): And that picture is one you took at the end of May or the 1st of June with Mr. Butcher, isn't that right, Mr. Agostino?

A. That is correct.

Q. There is no blade shown on that tractor, is there?

A. The blade, you take the blade off when you

(Testimony of Bruno Agostino.)

no use it because you use a cat to log and you don't need a blade.

Q. Now I believe you said something about seeing one of your tractors later in September or in August, I believe you said, with an arch on it, is that correct?      A. Correct.

Q. Did you take a picture of that? [577]

A. Yes.

Q. I show you plaintiff's Exhibits 27 and 28 and ask you if these are the pictures that you took of that?      A. Yes.

Q. That is your cat?      A. I take that, too.

Q. That is Columbia Lumber cat here?

A. Yes.

Q. So picture marked 28 is the one that shows it, is that right?      A. Yes.

Q. Now, I want you to look at this closer and see if you can't tell that there is no arch connected with that tractor at all there?

A. I say that is his cat and these—that arch in there on your cat.

Q. The arch is on Columbia Lumber——

A. And there is the one on my cat.

Q. There is one on your cat?

A. Pick out one of the other pictures.

Q. Is this the one you mean?

A. No, sir, that is another one. Pick out the other one.

Q. I will give you all the small pictures that are here, you pick it out.

(Testimony of Bruno Agostino.)

A. That is the D-7.

Q. Is there any arch on that? [578]

A. No, I don't say there is any arch. That is your cat and this is the D-8 right there. That is the arch right there.

Q. But that arch isn't connected to the D-8?

A. That was connected down at the bottom. That is behind the cat right there. This is the cat's housing, these all go behind the cat.

Q. In other words it doesn't show the cat at all?

A. What do you call this, isn't that the cat?

Q. This one right here is the cat? A. Yes.

Q. Where is the arch?

A. There is the arch right there—see the arch right there. Show that to the jury.

Mr. Boochever: This here is what he says is the arch and here he says is the cat.

Q. You had better show them on that because I don't want to misrepresent them on that.

A. Well, Gentlemen and Jury, this is the arch. See, they got the whole by itself. This is connected behind the cat and this is the cat track here. The cat go that way and right behind and whatever the arch.

Q. Which cat is your cat?

A. This one here is only one cat and this is the arch. There is nothing else there. Show to all the jurors. Some of them maybe know how the cat work. [579]

Q. Do you know, Mr. Agostino, that an arch is

(Testimony of Bruno Agostino.)

never put on the front always put on the back?

A. That is on the back end, that is not on the front end.

Q. I don't understand the picture that way but that is for the jury to decide.

A. You don't see it?

Q. Are there one or two cats in that picture?

A. One cat.

Juror Fenn: Are there two cats in that picture?

The Court: You will have to ask the witness.

Juror Fenn: Are there two cats in the picture?

The Court: You may answer the question.

The Witness: This is the cat. This is the carriage, what we call an arch. You see these wheels are here belonging to the arch. The arch is connected, draw-bar here behind the cat.

Juror Fenn: It is two different units?

The Witness: Two different units here.

Juror Farrell: Which way was the cat traveling?

The Witness: Traveled that way.

The Court: What was the answer, are there two cats shown in the picture?

The Witness: No, just one cat, Your Honor.

Q. (By Mr. Boochever): Now, Mr. Agostino, in regard to that sawmill, what you call your sawmill, when did you buy that? [580]

A. We buy that 1943.

Q. In 1943? A. Yes.



(Testimony of Bruno Agostino.)

Q. And then you put it out there on that platform?

A. We don't take it until 1944 up to there and then we put it up.

Q. And it has been sitting out there ever since?

A. Well, we never started. We had a tie contract with the railroad here and then they told us that we got no facilities to load it here in Whittier and we no started yet.

Q. My question was—the sawmill since you put it up there has been sitting there ever since?

A. Yes.

Q. I believe you testified that you went to Mr. Ross about the end of July or 1st of August?

A. Yes, sometime after I quit Mr. Butcher I went to him.

Q. Actually that was the end of August—the 1st of September?

A. I couldn't give the exact date, around in there.

Mr. Boochever: No further questions.

Mr. Bell: I would like to ask one further question.

Mr. Boochever: Your Honor, unless it is connection with the cross-examination we wish to object.

Mr. Bell: I forgot to ask him about this new map which was drawn by another witness. [581]

(Testimony of Bruno Agostino.)

Further Redirect Examination

By Mr. Bell:

Q. Mr. Agostino, I had you a paper that is marked Defendant's Exhibit "F", a sketch, I will ask you to state—study that over a little bit—and ask you to state if that correctly shows the condition at the mouth of Mosquito Creek?

Mr. Boochever: I must object as improper redirect examination.

The Court: I know, but it will be admitted.

The Witness: I have got no idea what that map is.

Q. (By Mr. Bell): Assuming that the top of the map is north and that this is Mosquito Creek, does that look anything like the mouth of the Creek there?

A. No, sir, Mosquito Creek it comes around and go the clear to the west into the ocean.

Q. Now, then, I call your attention again after examining that to this map that you have prepared here and ask you to state which one of those represents the condition at the mouth of Mosquito Creek best—the map you have drawn or that other map?

Mr. Boochever: Object to that as improper rebuttal testimony and further that if there is any comparison to be made this witness hasn't qualified to make such a comparison.

The Court: Overruled. [582]

The Witness: This is the creek.

The Court: Just answer the question, Mr. Agostino. The question is—which of those maps most

(Testimony of Bruno Agostino.)

nearly accurately represents the actual situation of the mouth of Mosquito Creek and vicinity?

The Witness: This is the correct one. It is not by scale but they have a picture of the country.

Q. (By Mr. Bell): That is the one that is Plaintiff's Identification No. 2 in Exhibit No. 2?

A. Correct, this is the road here.

Q. Is Mosquito Creek from the mouth on up straight anywhere?

Mr. Boochever: Your Honor, I object to this as being improper at this time because the witness who made that other map testified that he drew the lines straight but it was not a straight stream. He told that and qualified it in introducing it in evidence.

The Court: Objection is sustained.

Q. (By Mr. Bell): Bruno, have you been up Mosquito Creek as far as the Columbia Lumber Company's camp up there? A. Yes.

Q. Does the tidewater go up that high?

A. Yes.

Mr. Boochever: Your Honor, I must object to this as being [583] entirely improper at this time.

The Court: Objection is sustained.

Mr. Bell: Exception. That was testified to in defense and I haven't had an opportunity to deny it. They stated that tidewater went on up above and I want to show that it doesn't.

The Court: I think it was testified to in direct examination but in view of counsel's statement the

(Testimony of Bruno Agostino.)

ruling will be set aside and he has answered and it——

Mr. Boochever: I don't want to keep bothering and I wish he was told the camp and another time, another place——

Mr. Bell: I didn't know.

The Witness: I said the Columbia camp.

Q. (By Mr. Bell): I never knew of but one Columbia camp, what camp are you referring to?

A. That is the camp of Columbia there up in the creek. It is about a mile from my camp.

Q. Does the tidewater at time of highest tide get up that high?

A. Yes, he no reach to the bend but the creek would be about 7 or 8 feet of water.

Q. At high tide? A. Yes.

Q. How wide would the creek be there?

A. Further up you go to its mouth it is about 10 or 11-feet [584] wide.

Q. And in low tide what is the condition there where the Columbia Lumber Company's camp was when you last saw it?

Mr. Boochever: I object to using "the Columbia Lumber Company camp" if he further modifies——

The Court: Isn't it the Columbia Lumber Company camp now? Whatever camp it is the jury will understand they are talking about the camp that is now occupied.

(Testimony of Bruno Agostino.)

The Witness: There is only one camp, I don't know how you want to call it.

Q. (By Mr. Bell): What is the condition of the creek in low tide?

A. When the tide is out you can cross it with shoepacs, that is about foot or foot and one-half or 7 or 8-foot wide.

Q. You could wade right across in your shoe-pacs? A. Yes, sir.

Mr. Bell: I think that is all.

Mr. Boochever: No further questions.

The Court: That is all. Another witness may be called.

Mr. Bell: We rest, then, Your Honor.

The Court: Any sur-rebuttal?

Mr. Boochever: No sur-rebuttal.

The Court: Both sides rest?

Mr. Bell: Your Honor, I don't want to rest until those things are read. They offered them but did not read them to [585] the jury.

Mr. Davis: I thought that it was stipulated both counsel could read them without argument.

The Court: If counsel insist on having them, otherwise they may be read during argument.

Mr. Bell: That is all right.

The Court: Next thing under our practice is instructions to the jury.

Mr. Davis: Now, Your Honor, before any instructions we have some motions we would like to make.

The Court: Jury may retire to the jury room until recalled.

Mr. Davis: If the Court please, briefly we wish to renew the motions which were made at the close of the plaintiff's case the other day—a motion for a directed verdict for the defendant and a motion of non-suit as against the plaintiff, the grounds being that the plaintiff has not proved his case here and that there is no proper matter to go before the jury.

\* \* \*

[586]

The Court: Will counsel suspend, it is apparent we cannot go very much further tonight and I hesitate to keep the jury detained upstairs.

Jury may be recalled.

The Court: Record will show all members of the jury present. Ladies and gentlemen of the jury it is apparent that questions of law which are being discussed by counsel will take some little time and I think that it would be an imposition upon you to keep you here when we may not be through much if at all before five o'clock. Therefore, you may now retire and the trial so far as you are concerned will be resumed tomorrow morning at 10 o'clock. In the meantime you will remember the provision of the law which forbids you to discuss the case among yourselves or with others or to listen to any conversation about it and not to form or express an opinion until it is finally submitted to you. You may now retire and report tomorrow morning at 10 o'clock.



The Court: Is it the desire of counsel to have this reported?

Mr. Boochever: No.

Mr. Davis: I have no particular desire.

Mr. Bell: I have none whatever.

The Court: The reporter may be excused.

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(Whereupon, at 5:00 p.m., Monday, June 6, 1949. the taking of notes of the case on trial was suspended until 10:00 a.m., Tuesday, April 7, 1949.) [607]

Tuesday, April 7, 1949

(Whereupon, at 10:00 a.m., the above-entitled matter came on for taking of testimony.)

The Court: Clerk may call the roll of the jury in the box.

(Names of jurors were called by the Clerk and responded to as they were called.)

The Clerk: They are all present, Your Honor.

The Court: Motions interposed before we adjourned last night are all denied. Exceptions may be noted to the rulings of the Court.

Next thing in the course of the trial is the reading of the instructions to the jury.

Mr. Bell: Your Honor, may counsel approach the bench before the instructions are read?

The Court: Counsel for both parties may approach the bench together with the reporter.

Mr. Davis: Instruction 6-D, it talks about there being a independent [610] logging contractor and apparently leaves it to the jury to decide whether there was an independent contract—whether Lambert was or was not an independent contractor. It is our theory the evidence in the case is absolutely undisputable by any of the parties standing before the Court admittedly that under the evidence before the Court that Lambert under the law is an independent contractor.

If I am wrong, Your Honor, then I feel that we should give an instruction of what is an independent contractor because there is no standard at all set forth there for the jury to find how you determine an independent contractor or what authority an independent contractor has.

We presented a minute ago a proposed instruction about an independent contractor. We only prepared that in the event that the Court ruling stands that the jury is to find out whether or not Lambert is an independent contractor. We think that is a quetsion of law.

The Court: I am going to put the question to the jury, but I think it is quite right in asking the Court to define an independent contractor.

During the course of the argument I shall try to get some unassailable statement of law and give that to the jury later.

Mr. Bell: Now, Your Honor, my contention, of course, is that Lambert was not an independent con-

tractor; that he was a wage worker on piece work.

The Court: I am putting that to the jury.

Mr. Bell: And I believe if you put one part of it you should put both parts in your instructions that if he was a piece worker and using your equipment and handling their timber that he would not be an independent contractor.

The fact that the price was fixed based upon delivery of logs would not make him an independent contractor, that he would be an employee the same but on piece work, and, of course, that is my contention. Now, there are a lot of exceptions that I think I want to raise but I don't want to raise them now.

Mr. Boochever: Your Honor, there is one other point I would like to add and that is if this Instruction 5-B about third persons taking that property, which if counsel says in effect removes that, I feel that a directed verdict should be given at least as to the two tractors and the donkey machine in view of the fact—I feel that a directed verdict should be given at least as to the two tractors and the donkey machine in that the plaintiff, Agostino, and the witness, Lambert, and every other witness testified that they were not touched or used in any matter or form until after the July contract and the jury will absolutely be wrong in saying that there was an implied contract of sale by the taking possession of those items of property and assessing damages on that, and it would be absolutely improper for them to do that.

The evidence shows conclusively he turned it all over to [612] him when he walked out.

\* \* \*

I have noticed as I went along that in several of the instructions the word "plaintiffs" was plaintiff" instead of "plaintiffs." Wherever I use the word "plaintiff" you will understand that I refer to the two plaintiffs in this action and the instructions will be amended accordingly. I assume counsel has no objections to putting an "s" on the word "plaintiff" wherever it appears.

Counsel and the reporter may come to the desk to take exceptions to the instructions. The plaintiffs will take exceptions first.

\* \* \*

[646]

The Court: Counsel for defendant may take exceptions.

Mr. Davis: Your Honor, in Instruction 3, page 2, line 8, 9 and 10 as given, the Court uses the following language "\* \* \* and denies that plaintiffs gave to the defendant at its request possession of all of said property and denies that defendant thereby became indebted to the plaintiffs and obligated to pay \* \* \*" that is not complete but that shows what I am interested in.

The Court: What do you except to?

Mr. Davis: I except to the matter of using possession of all of said property. I believe that we have not only denied that they gave us all of it but we denied that they gave us any of it.

Mr. Bell: I would have no objection to Your Honor adding the word "all or any."

Mr. Davis: All or any would be satisfactory to me.

The Court: I will write the word "all or any."

Mr. Davis: Your Honor, on Instruction No. 4 as given, commencing with line 9 and ending with the end of the first paragraph it is set forth that oral contracts—personal property—[651] if proved, may be just as valid and enforceable as though it were written. I think the instruction is probably correct except that it is misleading in view of the fact that the statute of fraud is not set forth at that point. You did set forth statute of fraud and I believe it was in Instruction No. — but as written here it says that they are just as valid and enforceable as though in writing and that is not true, I think, at that point except as governed by the statute of fraud set forth in Section 6 or something in that order.

The Court: I think it is sufficiently covered. And, then, there is the instruction that the instructions should be considered as a whole and the jury shouldn't single out any one single instruction to the exclusion of the others.

Mr. Davis: My thought is being in there at that particular and then the statute of fraud stands by itself and then the jury will probably overlook it.

I would like to except to the giving of that portion of Instruction No. 4 contained in the last paragraph of that instruction or the last paragraph

of the first page, begins in this case “\* \* \* there is not sufficient evidence \* \* \*” and on to the end of the paragraph for the reason, Your Honor, it is our contention and I believe the evidence shows that there wasn’t either an express agreement or an implied agreement at the time and place in question and that anything about price was just as fully discussed as anything else; that if [652] there was any price it was fully discussed by the parties. The question is as to whether or not there was any agreement and it is our contention that as a matter of law there wasn’t any agreement, express or implied at all either for reasonable value or for \$25,000 or any other agreement.

I would like to except to the giving of the last paragraph of Instruction 4 continued for the reason that it does not set forth the dates in question on or about March 24th. It leaves it open to say that we might have taken possession of that property in December or this year or some other time and would find a contract from that point.

The Court: I think that may be a good objection.

Mr. Davis: I would suggest that after the words “that the plaintiffs” between the plaintiffs and sold that “the plaintiffs on or about March 28 sold \* \* \*”.

The Court: I will insert that.

Mr. Davis: Then I would suggest that in line 10 between the words “defendant” and “accepted” we put in the date again.



The Court: I think that is good.

Mr. Bell: I would like to except to that.

The Court: You have your exception, of course.

Mr. Davis: I would like to except to certain portions of Instruction 5 as given. I have written over the plaintiffs' exception and I have a hard time finding them there. It is our contention, Your Honor, you have gone too far here as to what [653] possession a person has on so-called tidelands. It is our contention that by the law a person has only the right to use tidelands including the—between high tide and low mean and he only has the right to use lands in common with anybody else unless he has permanent improvements of some kind which excludes other people from possession. I don't believe that it is correct to say that a person may claim a pond, as we have here, claim the whole pond—not using it but claiming and therefore you can't go in and claim that tideland, that is the crux of this whole case—they claim we took possession by using that pond.

The Court: I think the tideland——

Mr. Davis: That is true, but that was on one little portion of that pond.

Mr. Bell: It is around the edge of the pond—he is clear across.

The Court: I relied here on the case of *Harness versus Petersburg*. I think it was reported in 260 Federal.

Mr. Boochever: Didn't Your Honor, think that there should be a statement in there that it is only

to the portion of the tidelands on which the plaintiff has useful improvements?

The Court: I said "took possession." I think that is sufficient.

Mr. Davis: That is the important part. We have talked about possession but "possession" to the plaintiff evidently means something far different. I wonder if we shouldn't have [654] a little definition of what it means.

The Court: You will take your exception and I will give it thought during your argument. Right now I don't see that it needs any elucidation.

Mr. Davis: I would like then to except to the latter paragraph of that Instruction 5 insofar as the talked about claim of possession without defining what "possession" is and on the ground we had with plaintiffs equal right to use those tidelands with the plaintiffs except insofar as they have excluded them from the public domain.

Mr. Boochever: There is no where stated—It states in line 11 that if you find in this case that plaintiffs were in the actual possession and use of any tidelands then in that event they were entitled to remain in possession thereof as against all other claims or claimants seeking possession of such tidelands from the plaintiffs, because it is a well established law that the United States has paramount title to the tidelands and a right under the United States.

The Court: If you mention the United States and mix it up in it is just one more thing for the

jury to consider and the United States is not involved in this case at all. Counsel is quite correct as to the law but I don't see how—why the instructions should properly make that exception in the case of the United States.

Mr. Boochever: Well, at least as far as the public lands [655] above tidelands, the rights of the United States are of great relevancy and the rights of each and the rights of each, we feel, is very essential, which should be stated in this case as it goes to the very essence of this argument.

The Court: I think that is covered in the last part of 5. However, you have your exception.

Mr. Davis: Your Honor, we would like to except to the giving of the first paragraph of 5-A for the reason that in that instruction the Court has allowed the jury to find out as to whether or not there was an implied contract and allowed the jury to speculate on reasonable value. It is our contention that we have, further, previously set forth in argument before the Court, that the evidence shows conclusively that there was no contract of any kind to buy or sell property. The minds of the parties did not meet and, certainly, there wasn't any evidence of any kind that the parties contracted on the basis of reasonable value. The only evidence is that one man made an offer to sell for \$25,000 and that offer was rejected, or, possibly I should say that on or about March 24th that there was a discussion—promise that there would be further negotiations and then it was rejected. I think it is

improper for the Court to let this matter go to the jury on the basis of quantum valebant theory.

I would like to except, Your Honor, to the giving of that portion of Instruction 6-A commencing in line 7. I believe it [656] is “\* \* \* as a matter of law” ending on line 14 “\* \* \* on or about March 24, 1948,” for the reason that you have ruled out there—the written agreement. You have held that as a matter of law that that written agreement is not sufficient to constitute a bar to the enforcement of the alleged oral contract. Of course it is our contention that there wasn't any oral contract and that the written contract was the only contract entered into between the parties. But, as a matter of law, I don't think it can be said that the written contract did not bar a contract made in March for several reasons. In the first place the written agreement on the face of it purports to be all the negotiations between the parties, to contain the full agreement between the parties, and the written agreement was the agreement between the parties and I think as a matter of law it should not be ruled out as a bar to the so-called agreement in March.

I would like to except to the giving of Instruction 6-C insofar as it leaves it open to the jury to speculate as to whether or not Kenneth D. Lambert was an independent contractor. It appears to me clear from the evidence—from all the evidence, from the undisputed evidence—that Kenneth D. Lambert was an independent contractor.

I would like to except to the giving of Instruction 6-D on the same ground. They are comparison instructions. We feel it is an error on the part of the Court and highly prejudicial to us to let the matter go to the jury speculating whether [657] or not Lambert was an independent contractor. I think the Court should find as a matter of law that he was and that his actions did not bind the defendants in this case and any material or equipment he took after March 24th or after April 2nd, I guess it is, would not be binding on Columbia Lumber without some showing of authority which hasn't been shown here, in fact to the contrary, it is shown particularly that it didn't have any such authority.

I think that covers it, except I might suggest that the Court make three forms of verdict here instead of two. I think it may be just a little bit confusing here. We might have a verdict for the plaintiff in the blank amount that you have it; a verdict for the defendant without any amount; and then a third form of verdict for the defendant in his counter claim, if any. I think that the way it is set up might be somewhat confusing to the jury.

The Court: I will give it consideration.

Mr. Davis: Your Honor, in this case we requested 33 separate instructions on behalf of the defendant; two of those instructions were not handed to Your Honor until this morning, and I don't think you have yet had time to consider them.

The Court: I shall refuse to give 32 because it comments on the evidence.

Mr. Davis: The reason for asking for 32, Your Honor, is the fact that it has been set forth in the complaint "connivance [658] and scheme" and so forth. We move to strike that portion as to conclusions of law and prejudice when the Court didn't agree with us on that point. There hasn't been any evidence. We feel it is highly—and some sort of instruction of that kind ought to be given.

Mr. Bell: There was substantial evidence to show it.

The Court: I shall consider it further in view of counsel's statement. The one on independent contractor I have not read and it may be given or refused.

Mr. Davis: We would like to except, Your Honor, to the failure of the Court to give instruction No. 4 as requested by the defendant for the reason we believe that that correctly states the law and should properly be given under the evidence in this case.

We would like to except to the failure of the Court to give requested instruction of the defendant No. 6 on the same ground and for the same reasons and the same as to requested instruction No. 7 of defendant.

It is apparent that we are going to have to discuss damages in this case and the jury may get the idea that since we discussed damages in this case and the jury may get the idea that since we dis-



cussed damages in argument that we must feel that they are entitled to damages which, of course, we do not. We can argue it but I am afraid merely by discussing it we may be admitting some liability for damages. [659]

Your Honor, we except to the failure of requested instruction, defendant's No. 9, that has been covered in part by other instructions but in this case it is apparent from the evidence here that this case is going to hinge pretty largely on sympathy, on prejudice, and we feel we are entitled to a particular instruction on that point—on the facts as disclosed by the evidence in this case.

Requested Instruction No. 10, I think, is about the same as Requested Instruction No. 8. The same general matter is covered by it. If one is given then, of course, we wouldn't require both of them, but we think something should be given on that subject.

Instruction 11 is the same way, it is a companion instruction.

We think requested Instruction No. 12 is a proper instruction under the evidence of this case and should have been given by the Court—that the plaintiff must not only prove in this case that there was an agreement but how much, if any, he has been damaged by failure to go through with the agreement.

Your Honor, requested Instruction of the Defendant No. 14, has to do with independent contractors and Kenneth Lambert, as previously mentioned we feel that we are entitled as a matter of law to

an instruction that Lambert was an independent contractor. We also feel that we are entitled to an instruction of the Court that Lambert's employment was such prior to the [660] time that he started as an independent contractor that he wasn't entitled to bind the defendant on any sale or attempted sale or purchase or anything of that nature. We feel that the evidence is undisputed in that respect and that it is improper to let that matter go to the jury without an instruction on it.

Mr. Davis: Your Honor, I passed up apparently our requested Instruction No. 13 which the Court originally made up as your Instruction 5-B which I believe you are now going to modify. We feel that the matter set forth in that requested instruction is proper—a proper statement of the law and proper to the facts of this case, and while, of course, if the Court modifies we might be satisfied with the modification we certainly—

The Court: You had better take your exception.

Mr. Davis: I am taking exception to the failure to give our requested Instruction No. 13. I had better, maybe, be a little more specific on that. We feel, your Honor, that under our theory of the case that the only possession taken of any property by the defendant was taken under the agreement made at the last of June, that the agreement was not consummated, we feel, by a result of the failure of the plaintiffs to go through with it but at any rate it is admitted all the way around that it was not consummated. We feel under those circumstances

we were entitled to rescind and redeliver the property and that we did redeliver it and that after that time if any property [661] it was taken away by a third party we were not responsible for it and I think there should be instructions along that line.

We would like to except to the failure of the Court to give our requested instruction No. 22 which has to do with this pond—I am sorry, Instruction No. 20—this pond and these tidewaters. I have already fairly well covered that in the exceptions I took to the instructions as given by the Court, but we feel that Instruction No. 20 as written properly states the law and properly states the law that should be given under the evidence in this case. We would like to except to the failure of the Court to give our requested Instruction No. 21 for the reason we believe that that requested instruction, while you have given it in part, we feel that the part that you have left out is material to the consideration of the jury under the evidence of this case and properly states the law in connection with it and by failing to give all of the instructions you have left out some points that should be covered.

We would like to except to the failure of the Court to give our requested Instruction No. 22 for the reason that it is undisputed that the defendant redelivered this property back to the plaintiffs' property and that the plaintiffs did nothing at all to protect their property; that some third party not connected with the defendant in any way took the

property away and we feel we are entitled to an instruction that under those circumstances that it was the duty of the plaintiffs to use [662] due care to protect their property, that if they didn't use due care that we are entitled—that they are not entitled to recover against us by reason of that.

We would like to except to the failure of the Court to give our requested Instruction No. 24 on the ground that the undisputed evidence is that Lambert at the time the gasoline was borrowed was not even an employee of Columbia Lumber Company. By all the evidence he was an independent contractor at that time; that it is apparent from the evidence that Lambert borrowed that gasoline on his own hook, that he borrowed it not by any direction of the defendant but by permission of the plaintiffs and under those circumstances the defendant should not be held liable for that gas and oil as not any evidence at all that there had been a sale.

I would like to except to the failure of the Court to give our requested Instruction No. 26. We feel, your Honor, that in order to establish anything at all the burden is on the plaintiffs to show that there was an agreement and that possession was given at the time in question—March 24, 1948 or thereabouts, in accordance with their complaint and that to leave it speculative that possibly taking possession under some other deal some months later is improper to let it go to the jury under those circumstances.

We also take the position that the only thing in

evidence about possession at all was that we took possession of certain [663] tidelands which we feel that under the evidence and under the law we had a perfect right to do.

I would like to except to the failure of the Court to give our requested instruction No. 27 because of the fact that it does appear without question that the plaintiffs as late as May of this year, over a year after the date of the alleged sale, did say that they were the owners of the tractor in question; that either plaintiffs or—if the sale was made, if they are—I will back up. If the plaintiffs are as they claim in this Third Amended Complaint in the Ellamar Packing case, if they are the owners of that tractor then they certainly are not the real parties in interest in this case so far as the tractor is concerned.

Mr. Bell: At this particular point we wish to call the Court's attention that the Ellamar Packing suit was filed——

The Court: Wait a minute, let counsel proceed.

Mr. Davis: I would like to except to the failure of the Court to give our requested Instruction No. 28 in behalf of the Defendant or at any rate—maybe that is too broad the way it is—but I think the Court should give some instruction to the effect that allegations that are not denied by the answer are admitted to be true. Now, possibly in setting it down to that particular section we were wrong but the Court should give some instruction to that



point so that the jury will know and we can argue it. [664]

We consider, your Honor, that the Court pretty well covered requested Instruction No. 29. We take no exception to that.

We would like to except to the failure of the Court to give our requested Instruction No. 31. While it is true that the Court has given the law which is there setting—there set forth in just stating the statement of law, that it is not covered as applied to the facts of this case and we believe that this particular requested instruction should have been given rather than the instruction concerning the law of sales and the law of rescission of sales.

At this time, then, your Honor, I would like to except to the failure of the Court to give our requested Instructions Nos. 32 and 33 which I realize the Court hasn't had a chance to consider fully yet. I will take exception at this time and then later if the Court——.

Mr. Bell: They are the two that were typed as requested—they were the two that were penned?

The Court: Ladies and Gentlemen of the Jury, as a result of conference with counsel two amendments have been made to the instructions, one is Instruction 3 on page 2, the text read before. This is a recitation of the claim of the defendant and the text reads “ \* \* \* denies that plaintiffs sold to the defendant the property described in said Second Amended Complaint and denies that plaintiff gave



to the defendant at its request [665] possession of all of said property \* \* \*” That was obviously an error and I have inserted the words “or any” so it now reads “\* \* \* all or any \* \* \*.” The defendant denies that the plaintiffs gave the defendant all or any of the property.

And, again, in Instruction No. 4 on the second page thereof, the page being marked “4. (continued)”, so that you would not make a mistake and think that the instructions referred to June or July. As now written the last paragraph reads as follows: “So in this case if you find from all of the evidence and by a preponderance thereof, and under these instructions as to the law, that the plaintiffs on or about March 24, 1948, sold and delivered the property in question to the defendant and the defendant accepted said property and took possession thereof, the law implies a promise on the part of the defendant to pay the reasonable value of the property, that reasonable value to be determined by you from the evidence in the case, but in no event to exceed \$25,000.00.”

You will observe that the correcting language has been written in in ink.

It may be that later as a result of converence with counsel I shall give further instructions but that is not now certain.

The Court now stands in recess for ten minutes until ten minutes of twelve.

(Short recess.) [666]

The Court: Without objection the record will

show all members of the jury present.

Do counsel care to submit to any limitation of argument?

Mr. Davis: Your Honor, I think possibly we have been in trial here a week. I think probably we should not entirely submit to limitation of argument. I am going to try to keep it as brief as I can and I feel—but I feel that it is an important case.

The Court: I presume that both of counsel on each side will desire to argue?

Mr. Bell: Your Honor, would you permit the opening argument by the plaintiffs to be made by two counsel and closed by one? I mentioned the matter to Mr. Davis who did not agree, however.

The Court: I see nothing unfair in that; in fact a good opening is better for the defendant than to have only a brief opening and then reserve all of the principal arguments for the closing when there is no chance to answer, so unless there is objection I shall permit both of counsel to open and one to close. It is now about nine minutes to twelve and I am wondering what ought to be done. What would suit best the convenience of the jury? Could all of you come back again at 1:00 o'clock or would you prefer to stay until 12:30 or so? I would like to suit your convenience. Some of you may have other obligations, particularly the ladies on the jury. If that is agreeable with counsel we will recess until 1:00 o'clock. [667]

Afternoon Session

The Court: Clerk will call the roll of the jury.

(Names of members of the jury were called by the Clerk and responded to.)

The Court: I think I shall have to put some kind of limitation on counsel and I don't think we would be justified in letting it run over until tomorrow. I think the limitation will be two hours to the side.

Mr. Davis: That is agreeable.

The Court: That ought to be ample and I hope that counsel will be able to give some of it back but I do not urge them to do so.

Do counsel desire to have their arguments reported?

Mr. Bell: No, not for the plaintiffs.

Mr. Davis: No, your Honor.

The Court: Reporter may be excused.

(Whereupon, argument was had by counsel for plaintiffs and counsel for defendant.) [668]

The Court: Now, these instructions which I have just read to you will be fitted into the other instructions which I have given at the proper place.

Counsel will come to the bench to take such exceptions as they desire. Plaintiffs' counsel may take exceptions first. [669]

\* \* \*

The Court: I am going to follow counsel's suggestion and insert "or some part thereof" on page 3 before defendant's counsel take their exceptions.

Mr. Davis: That will be “\* \* \* then accepted and received said——”

The Court: “or some part thereof.”

Counsel for defendant may take exceptions.

Mr. Boochever: The only one is in regard to Instruction 5 on page 2 where it states “Such actual possession is usually manifested by structural improvements or even by fences or posts or pilings.” We think that after that there should be added “and that the superior right established by such position extends only to such structural improvements and not to unoccupied portions of tidelands” or some such similar provision so that they will understand that a few pilings in a tideland pond does not give exclusive right to the whole pond but only to the portions occupied by the pilings.

The Court: Exceptions will be noted. Now, as to the instructions requested, I have marked each of them refused except as covered by instructions given and exception taken and I have signed it and these instructions will be filed now with the Clerk and may be considered as incorporated in the reporter’s notes at this time or as immediately following the taking of exceptions originally, whichever counsel desire. [671]

\* \* \*

Mr. Bell: Either way.

Mr. Davis: Entirely satisfactory with me.

Mr. Bell: Entirely satisfactory with us.

Mr. Boochever: Your Honor, what is your position in regard to a sealed verdict?

The Court: Well, if counsel stipulate there will be a sealed verdict. It is up to counsel. I do not feel that I have the right to impose a sealed verdict unless counsel agree to it.

Mr. Boochever: I frankly would rather not have one because I could leave by seven tomorrow, but I do not want to hold my personal desires in opposition with the Court.

The Court: It doesn't bother me at all. I am a wakeful individual.

Mr. Davis: So far as I am concerned I would prefer a sealed verdict if everybody else is agreeable.

Mr. Bell: I would, too.

The Court: We will not have it unless everyone stipulates.

Mr. Boochever: We will stipulate.

Mr. Bell: We will stipulate.

The Court: I have inserted in Instruction 6 page 3 the words "or some part thereof" those four or five words.

Instructions may be stapled together. Here is the sealed verdict. [698]

Ladies and Gentlemen of the Jury, counsel have stipulated that you may return what is called a sealed verdict, that is to say when you have agreed upon a verdict the foreman may sign it and it will be sealed and the foreman will put it in his pocket and keep it until you meet tomorrow morning at 10 o'clock. I will read you the instructions on the envelope and I think some of you have served on

juries before which have, perhaps, returned sealed verdicts.

The envelope is entitled In the Court and in the Cause and then reads as follows: "Sealed Verdict. Ladies and Gentlemen of the Jury: When you have agreed upon a verdict, have the foreman sign the same, seal it up in this envelope, and keep it in his possession, unopened. You may then separate and go to your homes. No juror must say anything about the verdict agreed upon. All the jurymen must be in the jury box in court at 10 o'clock a.m. of Wednesday, June 8, 1949, at which time the verdict will be handed to the Court and opened in the presence of the jury. Dated at Anchorage, Alaska, this 7th day of June, 1949." It is signed by me as District Judge. Bailey E. Bell and Herman H. Ross as attorneys for plaintiffs; R. Boochever and Edward V. Davis as attorneys for Defendant. So this will go with you with the other papers to the jury room.

Bailiffs may be sworn.

(Oath administered by Clerk to Bailiffs.)

Gentlemen, you will see that the jurors are provided with food and water and liquids other than alcoholic liquids, of course, and that the jury room is kept comfortably warm and furnish any heat that is required.

Ladies and Gentlemen, you may now retire to consider your verdict.

Is there anything further to come before the Court at this time?



(No response.)

The Court: Court stands adjourned until tomorrow morning at ten o'clock. [700]

Wednesday, June 8, 1949.

Whereupon, at 10:10 a.m., the above-entitled matter came on for receiving of the verdict from the jury foreman. [701]

The Court: Clerk will call the roll of the jury in the box.

(Names of the jurors were called and answered to.)

The Clerk: They are all present, your Honor.

The Court: Ladies and Gentlemen of the Jury, have you arrived at a verdict?

Jury Foreman: We have.

The Court: You may hand it to the Clerk. Sealed verdict is now opened in the presence of the jury. Clerk may read the verdict.

The Clerk: In the District Court for the Territory of Alaska, Third Division, Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, plaintiffs, versus Columbia Lumber Company, Inc., a corporation, Defendant. No. A-5207.

Verdict No. I. We the jury duly impaneled and sworn to try the above entitled cause do find for the plaintiffs and against the defendant and find that the plaintiffs are entitled to recover of and from the defendant the sum of Fourteen Thousand Ninety-Two and no/100 Dollars (\$14,092.00). Dated at Anchorage, Alaska, this 8th day of June, 1949.

/signed/ George Karabelnikoff, Foreman.

The Court: Ladies and Gentlemen of the Jury, you have heard the verdict, is that your verdict so say you all? [702]

Do any of counsel care to have the jury polled?

Mr. Davis: No, your Honor.

The Court: The verdict may be received and filed and entered and the envelope may be filed.

Thank you for your service, Ladies and Gentlemen. You are now discharged from consideration of this case.

(Whereupon, at 10:15 a.m., Wednesday, June 8, 1949, the Cause No. A-5207 was concluded.)

United States of America,  
Territory of Alaska—ss.

I, Oren J. Casey, the Official Court Reporter for the United States District Court, Third Division, Territory of Alaska, hereby certify the above and foregoing to be a true and correct transcript of the proceedings had in the above entitled matter in said Court at the time and place as set forth.

/s/ OREN J. CASEY,

Certified Shorthand Reporter.

[Endorsed]: Filed November 3, 1949. [704]

[Title of District Court and Cause.]

DESIGNATION OF RECORD

1. Amended Complaint.
2. Answer.
3. Second Amended Complaint.
4. Motion to Strike and Make More Definite and Certain.
5. Answer and Counterclaim to Second Amended Complaint.
6. Reply.
7. Motion to Strike Portions of Reply.
8. Defendants' Requested Instructions Number 14, 18, 19, 20, 21, 24, 26, 27, 28 and 29.
9. The Court's instructions to Jury.
10. Motion for New Trial.
11. Motion for Judgment Notwithstanding Verdict.
12. Supersedeas Bond.
13. Notice of Appeal.
14. Motion for Extension of Time.
15. Order Extending Time.
16. Transcript of Record, except the following portions thereof:

From Line 17, Page 187 to Line 22, Page 202.

From Line 19, Page 586 to Line 7, Page 590.

From Line 24, Page 590 to Line 12, Page 607.

From Line 15, Page 609 to Line 25, Page 610.

From Line 1, Page 613 to Line 1, Page 646.

From Line 11, Page 646 to Line 6, Page 651.

From Line 6, Page 669 to Line 2, Page 671.

From Line 1, Page 672 to Line 2, Page 698.

17. Statement of Points.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ J. L. McCARREY, JR.,

Of Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed Oct. 17, 1949.

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CERTIFICATE OF CLERK

United States of America,

Territory of Alaska,

Third Division—ss.

I, M. E. S. Brunelle, Clerk of the District Court for the Territory of Alaska, Third Division, do hereby certify that the foregoing and hereto annexed pages are the full, true and correct records and files in Cause No. A-5207 in the files in my office; that this is made in accordance with the stipulation of praecipe filed in my office on the 17th

day of October, 1949; that the foregoing has been prepared, examined and certified to by me.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court this 28th day of October, 1949.

M. E. S. BRUNELLE,  
Clerk.

[Seal] By /s/ IOLA FOWLER,  
Chief Deputy Clerk.

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[Endorsed]: No. 12393. United States Court of Appeals for the Ninth Circuit. Columbia Lumber Company, Inc., a corporation, Appellant, vs. Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, Appellees, vs. Bruno Agostino and Stanley Socha, co-partners doing business under the firm name and style of Barry Arm Camp, Appellants, vs. Columbia Lumber Company, Inc., a corporation, Appellee. Transcript of Record. Appeal from the District Court for the Territory of Alaska, Third Division.

Filed November 3, 1949.

/s/ PAUL P. O'BRIEN,  
Clerk of the United States Court of Appeals for the  
Ninth Circuit.

In the United States Court of Appeals  
For the Ninth Circuit  
No. A-5207

COLUMBIA LUMBER COMPANY, INC.,  
a corporation,

Appellant,

vs.

BRUNO AGOSTINO and STANLEY SOCHA, co-  
partners doing business under the firm name  
and style of BARRY ARM CAMP,

Appellee.

#### STATEMENT OF POINTS RELIED ON

Comes now the appellant above named and makes the following statement of points relied on in its appeal, namely:

1. The verdict as rendered was not supported by sufficient evidence but was contrary to the evidence.

2. The verdict as rendered was against the law.

3. The verdict as rendered was for excessive damages and was given under the influence of passion, prejudice or sympathy.

4. The Court erred in allowing over objection of defendant testimony of alleged oral conversations between one "Blackie" Lambert and plaintiff Bruno Agostino.



5. The Court erred in refusing to strike the testimony concerning the alleged oral conversations above mentioned, and in refusing to instruct the jury to disregard such testimony.

6. The Court erred in allowing the admission of plaintiffs' Exhibit No. 1 over objection of the defendant.

7. The Court erred in allowing the plaintiff Bruno Agostino to testify as to the contents of a telegram alleged to have been received by him from the United States Forest Service.

8. The Court erred in allowing plaintiffs to amend their complaint after the close of plaintiffs' case, and the Court erred in allowing the trial to proceed under plaintiffs' second amended complaint filed after the close of plaintiffs' evidence.

9. The Court erred in denying defendant's motion for a directed verdict made at the close of plaintiffs' direct case.

10. The Court erred in denying defendant's motion for non-suit made after the Court had ruled upon defendant's motion for a directed verdict.

11. The Court erred in refusing to grant defendant's motion to strike portions of plaintiffs' second amended complaint and to require portions of such second amended complaint to be made more definite and certain, the particular portions more fully appearing in defendant's motion to strike and to make more definite and certain.

12. The Court erred in denying defendant's motion to strike portions of plaintiffs' reply made to defendant's answer to plaintiffs' second amended complaint, such portions more fully appearing from the motion.

13. The Court erred in its refusal to grant the renewal of defendant's motion for a directed verdict at the close of all the evidence.

14. The Court erred in its refusal to grant the renewal of defendant's motion for a non-suit made at the close of all the evidence.

15. The Court erred in submitting the matter to the jury.

16. The Court erred in refusing to grant defendant's motion for judgment notwithstanding the verdict.

17. The Court erred in refusing to instruct the jury as a matter of law that the witness Lambert was an independent contractor from and after April 1, 1948 and that the said Lambert had no authority to bind the defendant to any sale or agreement for sale prior to April 1, 1948.

18. The Court erred in failing to instruct the jury that the written agreement entered into between the parties on or about June 29, 1948, together with the letter written by Thomas A. Morgan on behalf of the defendant on July 19, 1948, constituted a valid and existing agreement between the parties and binding upon the parties according to its terms

except as to plaintiffs' subsequent breach and repudiation thereof, and in failing to instruct the jury that any or all conversations had between the parties prior to the date of the written agreement were merged in the written agreement.

19. The Court erred in failing to instruct the jury as requested in defendant's requested instructions numbered 14, 18, 19, 20, 21, 24, 26, 27, 28 and 29.

20. The Court erred in giving the following portions of instruction No. 4:

(1) That portion of such instruction commencing with line 8 with the words "in case of land" and ending at the end of the first paragraph of said instruction.

(2) That portion of such instruction consisting of the last paragraph of the first page of such instruction commencing with the words "in this case" and ending with the end of such paragraph, and instruction No. 4 continued, ending with the words "says there was not."

(3) That portion of said instruction continued, consisting of the last paragraph thereof.

21. The Court erred in giving that portion of instruction No. 5 commencing on line 5 of such instruction with the words "the law in such cases" and continuing to the end of such instruction.

22. The Court erred in giving instruction No. 5-A.

23. The Court erred in giving that portion of instruction No. 6-A commencing on line 7 thereof with the words "as a matter of law" and ending in line 14 with the words "by March 24, 1948."

24. The Court erred in giving instruction No. 6-D.

25. The Court erred in denying defendant's motion for new trial.

26. The Court erred in denying defendant's motion for judgment notwithstanding the verdict.

Dated at Juneau, Alaska, October 14, 1949.

/s/ J. L. McCARREY, JR.

FAULKNER, BANFIELD &  
BOOCHEVER,

By /s/ R. BOOCHEVER,

Attorneys for Appellant.

Receipt of copy acknowledged.

[Endorsed]: Filed October 17, 1949.